

# TRANSCRIPT OF RECORD

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## Supreme Court of the United States

October TERM, ~~1913~~ 1914

No. ~~445~~ 446

W. S. FARISH, . . . . . Appellant,

vs.

STATE BANKING BOARD OF THE STATE OF OKLA-  
HOMA; THE BANK COMMISSIONER OF THE STATE  
OF OKLAHOMA, and THE UNION STATE BANK, a  
Corporation . . . . . Appellees.

No. ~~446~~ 447

STATE BANKING BOARD OF THE STATE OF OKLA-  
HOMA, THE BANK COMMISSIONER OF THE STATE  
OF OKLAHOMA, and THE UNION STATE BANK,  
a Corporation, . . . . . Appellants,

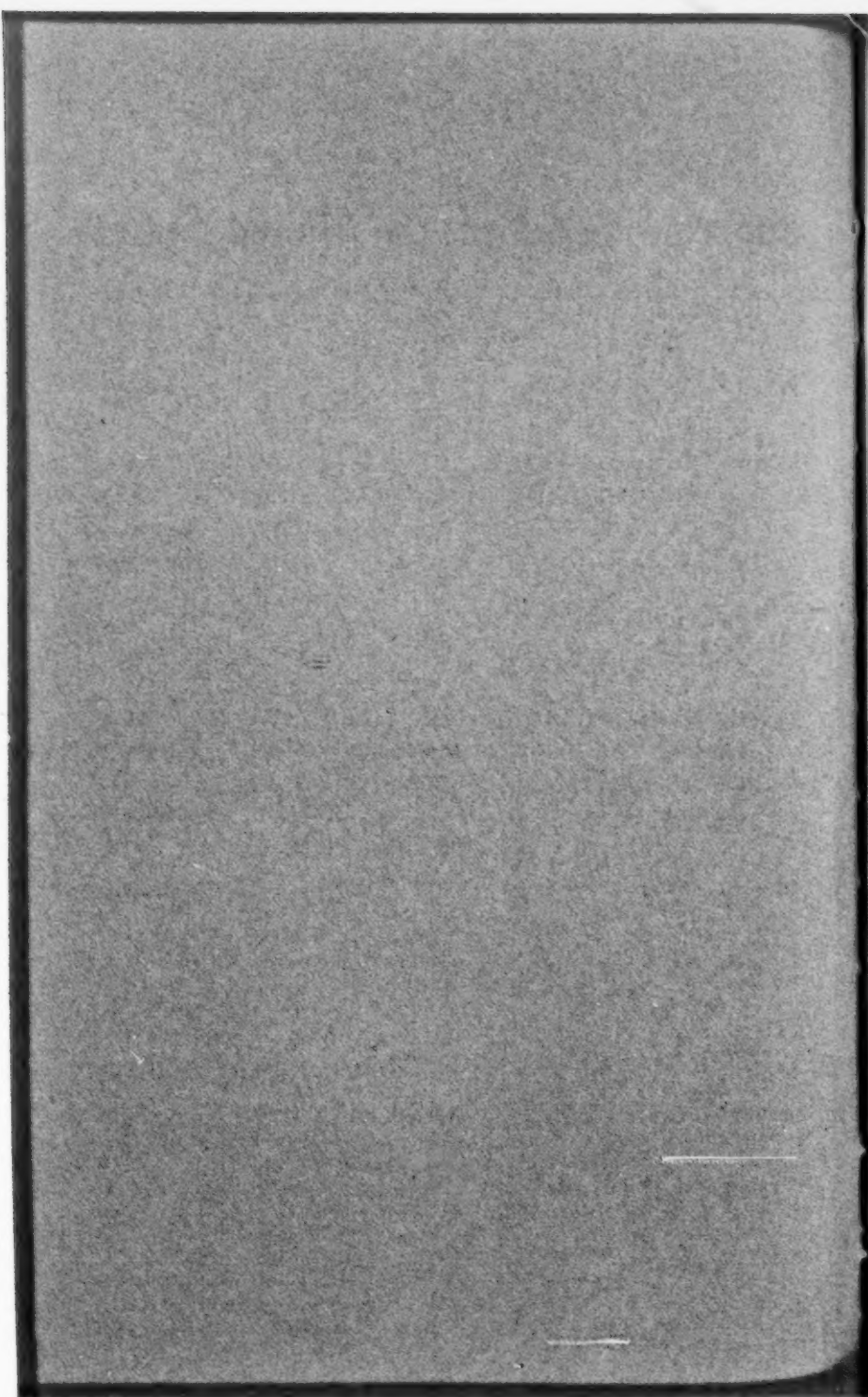
vs.

W. S. FARISH, . . . . . Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF OKLAHOMA.

Filed APR 15 1914

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PLEAS AND PROCEEDINGS BEFORE THE HONORABLE RALPH E. CAMPBELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

No. 1475.

W. S. Farish, *Plaintiff,*

*vs.*

In Equity.

State Banking Board et al., *Defendants.*

*United States Circuit Court, Eastern District of Oklahoma,  
at Muskogee.—W. S. Farish, Plaintiff, v. State Banking  
Board et al., Defendants.—In Equity.*

### Bill of Complaint.

*To the Honorable, the Judges of the Circuit Court of the  
United States for the Eastern District of Oklahoma:*

W. S. Farish, a citizen of the State of Texas, residing in the County of Harris, brings this his bill of complaint against the State Banking Board, a body or organization under the laws of the State of Oklahoma, composed of the Governor, the Lieutenant Governor, the President of the Board of Agriculture, the State Treasurer, and the State Auditor of said state, and against C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, the respective persons who now compose said board; and against E. B. Cockrell, Bank Commissioner, the Alamo State Bank, a corporation;



Oklahoma Trust Company, a corporation; The McNerney Company, a corporation, and P. J. McNerney—all the defendants being citizens of the State of Oklahoma and said corporations having their principal offices and places of business at Muskogee, where the defendant, P. J. McNerney, also resides, the other defendants residing at Oklahoma City, in said state,—and thereupon your orator complains and says:

### I.

That on or about the 22nd day of July, 1908, there was made and entered into between The Texas Company, a corporation and citizen of the State of Texas, and the defendant, P. J. McNerney, a certain contract for the sale of asphalt, and subsequently said McNerney and the defendant, The McNerney Company, procured certain street paving contracts in the City of Muskogee, Oklahoma, embracing twelve certain paving districts; that on or about the 5th day of January, 1909, and on or about the 14th day of June, 1909, said parties and others entered into certain other contracts, which were in writing, wherein and whereby it was, among other things, stipulated and agreed that, for the purpose of securing the indebtedness, present and future, of said McNerney and The McNerney Company, defendants, to said The Texas Company, there was pledged, assigned and set over to the latter all bonds to be issued for said work and all amounts owing or to become owing to the contractor on account of said contracts, and wherein and whereby it was expressly agreed by said Oklahoma Trust Company that any pledge or lien it had or might acquire should be subordinate to the rights of said The Texas Company, copies of which contracts are hereto attached marked as Exhibits A and B and made parts hereof; that in each instance the contracts with the city, for the work on the streets referred to in the contracts pleaded, had been made and entered into, so that said pledge and liens related to bonds to be issued and payments to be made for work under contract at the time the pledges were made or liens given; and that the paving bonds which were to be issued by the City of Muskogee in payment for said work were to be delivered to the Oklahoma Trust Company, and by it were to be accepted and paid for, simultaneously and as a cash transaction, within five days after delivery, at ninety cents on the dollar, as shown by said contracts and the addenda thereto.

### II.

That subsequently on the 9th day of December, 1909, The Texas Company, having advanced large sums of money

under said contracts, on which there is a balance due and owing your orator, as its assignee, at the present time, more than \$100,000, and having complied with all its undertakings and being entitled to collect and receive the money then owing to it and to the benefit of all of said securities, by an instrument of writing and for a valuable consideration, assigned and set over unto your orator all its claim and causes of action, as fully shown by a copy of said instrument, which is hereto attached, marked as Exhibit C and is made a part hereof; and that it was the intention and purpose thereby to transfer, assign and set over unto your orator all claims and causes of action which The Texas Company then had against the defendants herein or which might accrue to it out of the transactions mentioned herein.

### III.

That afterwards on the 18th day of December, 1909, paying bonds aggregating \$192,058.24 had been issued by said city, and a portion thereof, to-wit: paying bonds amounting to \$154,035.92 had, by installments, been delivered to said Oklahoma Trust Company, which had turned over only \$27,906.57 to The Texas Company, although a much greater time than five days had elapsed since its receipt of such bonds and each installment thereof; that said Oklahoma Trust Company had negotiated a part or all of said paying bonds, and had refused to pay for the same or to keep the proceeds separate and apart from its other funds, and was in a state of insolvency; that it had, however, prior to said date, received, in addition to said \$27,906.57, turned over as aforesaid, the sum of about \$40,000, from the sale of said bonds, which it carried as a deposit to the credit of itself, as trustee, and of which there remained to its credit, as such trustee, on the 3rd day of January, 1910, the sum of \$25,351.63; that this credit was intended by said defendant to evidence a deposit in favor of the party entitled thereto, and, by reason of the facts alleged, constituted a deposit for The Texas Company and your orator; and that on said 18th day of December, 1909, your orator filed in this court his bill of complaint against said defendants who were parties to said contracts and alleged said facts, the cause being in equity and numbered 1239. In addition to said averments there were in said bill of complaint many other and additional allegations which will more fully appear by an inspection thereof, and to that end said bill of complaint, as well as the subsequent amendment thereto, is here referred to and made a part hereof. And the plaintiff prayed, among other things, in substance: (1) that the court take jurisdiction of all matters and things alleged and presented; (2) that the defendant, Oklahoma Trust Company,

be enjoined and restrained from commingling or confusing funds derived from said paving bonds so issued on certain districts numbered 25, 33 and 64, and a bond for \$1000 on district 27, with any other funds, and that it be peremptorily commanded and required to keep such proceeds separate and apart; (3) that all of said bonds issued or to be issued, and the proceeds thereof, be decreed to constitute a trust fund, and all persons dealing with the same trustees, and that the same be decreed subject to the payment of the plaintiff's claim, and that payment be enforced accordingly; (4) that judgment be rendered against the parties liable for any part of the plaintiff's claim that should remain unpaid, and (5) for general relief.

#### IV.

That this court did on said date take jurisdiction of all matters and things alleged in said bill of complaint, and did issue its writ of injunction in accordance with the prayer thereof, which injunction was on the same date duly served on said Oklahoma Trust Company and is now in full force and effect, and the defendants in said cause have also been duly served with the writ of subpoena issued, and have entered their appearances therein; that thereafter on the 16th day of February, 1910, on the plaintiff's petition, this court in said cause appointed D. N. Fink receiver and directed him to demand and receive from said Oklahoma Trust Company, and from all other persons having the same or any portion thereof, the proceeds of said paving bonds, mentioned in said injunction, whereupon said D. N. Fink duly qualified as receiver and is now acting as such; and by said order of this court not only said Oklahoma Trust Company was, but all other persons having the proceeds of said paving bonds were also required and compelled to deliver the same forthwith to said receiver.

#### V.

That on or about the 31st day of December, 1909, certain of the paving bonds mentioned and embraced in said injunction having been sold by the direction of said Oklahoma Trust Company, the proceeds thereof, to the extent of \$21,252.40 were deposited in and with the Hamilton National Bank of Chicago, to the credit of said Oklahoma Trust Company.

#### VI.

That thereafter, on or about the 3rd day of January, 1910, in the City of Muskogee, said Oklahoma Trust Company sold its business to the defendant, Alamo State Bank, which had its principal office and place of business in said

City of Muskogee, and, as a part of said transaction, said Oklahoma Trust Company then and there, along with its other assets, transferred to said Alamo State Bank its credit balance with the Hamilton National Bank of Chicago, including said proceeds of paving bonds amounting to \$21,252.40.

#### VII.

That thereafter, on or about the 22nd day of January, 1910, other and additional bonds mentioned and embraced in said injunction having been sold by direction of said Oklahoma Trust Company, the proceeds thereof, to the extent of \$20,000 were turned over to said Alamo State Bank, and \$20,000 of said proceeds was paid to the Commerce Trust Company of Kansas City on an indebtedness of said Oklahoma Trust Company.

#### VIII.

That the aforesaid application of said \$40,000 was made with the consent and under the planning of said Alamo State Bank, acting through its agents and representatives; and in obtaining the benefit thereof, as well as in receiving the \$21,252.40 from the Chicago bank, said Alamo State Bank, through its agents and representatives, knew, or by the use of reasonable diligence could have known, that said funds, amounting to \$61,252.40, and each and every part thereof, were the proceeds of said paving bonds and protected by the injunction of this court.

#### IX.

Your orator further shows that previously and on or about the 29th day of October, 1909, said Oklahoma Trust Company became indebted to the Hamilton National Bank of Chicago in the sum of \$50,000, payment of which was assumed by said Alamo State Bank in said transaction of the 3rd day of January, 1910, and the latter party, on or about the 2nd day of February, 1910, issued therefor its obligation in the nature of a certificate of deposit for said amount in favor of said Hamilton National Bank, which certificate and obligation it paid off and discharged on or about the 15th day of April, 1910, appropriating and using said \$21,252.40 obtained from the sale of said paving bonds in so doing; that by virtue of pledges made and liens created by said Oklahoma Trust Company and the Alamo State Bank said Hamilton National Bank held as collateral security for the payment of its said debt, among other things, the following notes, which were released and turned over to said Alamo State Bank when it made said payment and they remained in its possession until recently taken by said State Banking Board, to-wit:

Number.	Name of Maker.	Amount.	
5250	C. R. Rison .....	\$ 1,330.00	
5296	J. R. Edrington .....	755.00	
5334	S. C. Pense .....	365.00	
5039	Lelia A. Holt .....	2,000.00	
5406	Jno. C. Clemons .....	827.00	
802	W. H. Roeser .....	2,436.01	See note
612	J. Cargile .....	1,537.50	See note
748	Genessee Chemical Co. ....	4,590.00	
5248	W. H. Barnes .....	7,500.00	
829	S. G. Reed .....	4,106.66	
5407	Jno. M. Lesley .....	575.00	
420-432, 441	Ontario Pipe Line Co. ....	9,500.00	See note

NOTE: These had also been pledged previously to Commerce Trust Company, but when released by it in February, 1910, were pledged to Hamilton National Bank.

Notes are also signed by others and endorsed and are secured by sundry collaterals. This applies to all, or nearly all, of the above.

## X.

Also that, as evidenced by its note dated on or about the 1st day of October, 1909, due and payable on demand, said Oklahoma Trust Company was indebted to said Commerce Trust Company of Kansas City, in the sum of \$50,000; that two payments were made thereon in the month of November, 1909, one of \$6,000 and the other of \$4,000, and another payment of \$20,000 on or about the 22nd day of January, 1909, and yet another of \$20,000 on or about the 8th day of February, 1910, were made thereon by or for said Oklahoma Trust Company, the January payment being made from the proceeds of said paving bonds; that said Commerce Trust Company, by virtue of pledges made and liens created by said Oklahoma Trust Company, held as collateral security for the payment of its said debt, among other things, the following bonds and notes, which were released and turned over to said Alamo State Bank when said last payment of \$20,000, above mentioned, was made, and remained in its possession until recently turned over to said State Banking Board, to-wit:

Number.	Name of Maker.	Amount.	
802	W. H. Roeser .....	\$ 2,436.01	See note
612	J. Cargile .....	1,537.50	See note
433	D. R. Brest .....	455.50	
669, 692, 730	J. H. Bradley .....	1,910.67	
430-432, 441	Ontario Pipe Line Co. ....	9,500.00	See note
10 Bonds	Ontario Pipe Line Co. ....	10,000.00	

NOTE: After being released by Commerce Trust Company in February, 1910, these were pledged to Hamilton National Bank.

The Cargile, Brest and Bradley notes are also signed by others and endorsed and are secured by sundry collaterals.



## XI.

Also that said Alamo State Bank had on hand in cash when recently taken charge of by the State Banking Board, and the latter now holds and retains, the sum of \$18,018.58, a large portion of which was of the \$20,000 received by it from the proceeds of said paving bonds on or about the 22nd day of January, 1910, but the precise amount and other facts can be ascertained only by a discovery or an accounting herein.

## XII.

Also that said Oklahoma Trust Company first, and said Alamo State Bank afterwards, with full knowledge of the facts, used large sums of the proceeds of said paving bonds in the course of their business, purchasing exchange, making loans and paying secured creditors therewith, in such manner and to such extent as to confuse the same with their cash and with such choses in action as were then or subsequently acquired or released, and thereby entitled your orator to assert a lien on all of same to the extent of the amount so used; that particularly is this true of loans made, notes and bonds discounted, and other securities and stocks purchased, acquired or received after the 1st day of November, 1909, by said Oklahoma Trust Company, and on or after the 3rd day of January, 1910, by said Alamo State Bank; but your orator is unable to give a list or description of such notes, bonds, stocks or other acquisitions and the same can be obtained only by discovery or an accounting herein; that said Alamo State Bank collected and turned over to said State Banking Board about \$10,000 from notes which were pledged to the Hamilton National Bank of Chicago and about \$10,000 from notes which were pledged to the Commerce Trust Company of Kansas City as hereinbefore alleged and which had been redeemed and released with the proceeds of paving bonds as aforesaid; and that said State Banking Board has itself collected or caused to be collected since the 25th day of August, 1910, on notes of The Ora Company \$1,020, on note of J. M. Lesley \$100, and on other notes \$2,000, which said board now holds, although said notes and each of them had been pledged and released as aforesaid.

## XIII.

That said Oklahoma Trust Company and said Alamo State Bank were each operating as banks, and the former also as a trust company, under the banking laws of the State of Oklahoma, and, prior to the transaction mentioned in this bill of complaint, had paid to the State Banking Board the assessments, including certain emergency assessments, levied against them, for the purpose of creating and maintaining

a depositors' guaranty fund, as provided by law, and at all times had certificates from the Bank Commissioner of said state showing that they had complied with the banking laws of Oklahoma and that the safety of their depositors was guaranteed by the Depositors' Guaranty Fund of the State of Oklahoma, and conspicuously displayed the same in their places of business, and did print and engrave upon their stationery and advertising matter words to the effect that their depositors were protected by the Depositors' Guaranty Fund of the State of Oklahoma, as authorized and provided by said state law, whereby many depositors were attracted and deposits obtained.

#### XIV.

That from and after the 1st day of November, 1909, and long prior thereto, said Oklahoma Trust Company was insolvent, but this was unknown to depositors, the public, your orator, or his assignors; that the affairs of said company reached a state, on or about the 31st day of December, 1909, where it was necessary to make some arrangement for the security of depositors, and the Bank Commissioner was present and was about to and really did take charge of said company and its affairs; that thereupon said sale to the Alamo State Bank was made on or about the 3rd day of January, 1910, and it assumed the payment of said depositors, except your orator, but the transfer of title was not absolute, said Oklahoma Trust Company retaining such equity in said assets as might remain after the amount expended by said Alamo State Bank under its said agreement of assumption should be realized therefrom; and that it was a part and parcel of this plan and arrangement and of the consideration for said assumption that the funds and assets which were in fact proceeds of said paving bonds, the \$25,351.63 then on hand and carried as a deposit, as well as the \$61,252.40 being or about to be realized, would be used as aforesaid and that this would obviate the necessity of the Bank Commissioner taking charge of said company while it had any property or taking charge of its assets while they were its property.

#### XV.

That when said Alamo State Bank so acquired the assets of said Oklahoma Trust Company on the 3rd day of January, 1910, and assumed the payment of its depositors, the amount of such deposits was about \$400,000, but the names of the depositors and the amount of each deposit are unknown to your orator; that thereafter, on dates unknown to your orator, said depositors, except your orator, were paid or caused to be paid by said Alamo State Bank, and this was accomplished in part

by the use of the proceeds of said paving bonds, obtained as aforesaid; that, counting cash funds that were turned over by said Oklahoma Trust Company to said Alamo State Bank on or about the 3rd day of January, 1910, cash in vault and cash items, cash in banks, including said sum in Chicago, and the amount paid on or about the 22nd day of January, 1910, said Alamo State Bank directly received not less than \$65,000 of the proceeds of said paving bonds as a part of the consideration of said assumption and the payment of said depositors; that the state, and, through it, said depositors, had a lien on all of the assets of said Oklahoma Trust Company to secure the payment of said depositors; and that, to the extent that the proceeds of said paving bonds were so used, your orator is subrogated to said lien, and, moreover, since said depositors were entitled to resort to the depositors' guaranty fund in the hands of said State Banking Board, and this was averted by said use of the proceeds of said paving bonds, a trust fund to which your orator was entitled, he is subrogated to that extent to the rights of said depositors against said guaranty fund, as it exists and shall exist, and against said State Banking Board.

#### XVI.

Your orator further shows that on or about the 6th day of August, 1910, he filed in said original equity cause in this court his motion against said Alamo State Bank for the purpose, as shown by the prayer, of obtaining an order against said Alamo State Bank for contempt and peremptorily requiring it to immediately pay over to the receiver herein the proceeds of paving bonds so received by it, to the amount of \$61,252.40, and that, in default of such payment, said receiver, or the marshal, or a sequestrator be directed to take the property of said Alamo State Bank, as under distringas, sequestration, or other appropriate writ, and to hold the same subject to such orders as the court, in the exercise of its proper jurisdiction for the plaintiff's protection, might make, and until said money should be restored or an equivalent sum paid over to the receiver; and said Alamo State Bank was on the same day notified in writing that said motion would be presented to the court on the 1st day of September, 1910, or as soon thereafter as practicable.

#### XVII.

That said Alamo State Bank was then insolvent, and on the 25th day of August, 1910, the defendant, E. B. Cockrell, as Bank Commissioner of the State of Oklahoma, took charge and possession of said Alamo State Bank and all its assets, including the assets turned over to it by said Oklahoma Trust Company on the 3rd day of January, 1910, or so much thereof

as received, thereby, in effect, also taking charge of said Oklahoma Trust Company and becoming bound to make proper and equitable distribution of said assets; and he and said State Banking Board have assumed and are now exercising jurisdiction and control over all of said matters and things, and, although they are equitably bound to make proper distribution of said assets, they are asserting a lien thereon, all for the exclusive benefit of certain depositors and said guaranty fund, and in repudiation of your orator's rights, and for the express purpose of depriving him thereof; but all of said property is yet located in the Alamo State Bank's place of business in Muskogee, Oklahoma.

### XVIII.

That besides the notes and bonds hereinbefore mentioned as having been held by the Hamilton National Bank of Chicago and the Commerce Trust Company of Kansas City, as collateral security, and released as aforesaid, the Oklahoma Trust Company owned and turned over to said Alamo State Bank, and the latter turned over to said Bank Commissioner and the State Banking Board, certain other notes and bonds, as follows:

Number.	Name of Maker.	Amount.
773	Exchange Investment Co. ....	\$25,750.00
766	J. H. Bradley .....	1,000.00
833	J. H. Bradley .....	1,540.00
753	L. F. Cain .....	103.34
311	Theo. W. Gulick .....	260.00
880	Genessee Chemical Co. ....	9,954.95
696	G. B. Fulmer .....	49.00
582	W. B. Eidson .....	50.00
688	Philip B. Hopkins .....	1,911.69
732	Philip B. Hopkins .....	1,500.00
874	R. N. Eggleston .....	1,716.00
584	R. W. Kellough .....	2,705.70
586	R. W. Kellough .....	5,100.00
585	R. W. Kellough .....	510.00
574	Charles H. Shaw .....	3,906.25
575	Charles H. Shaw .....	3,937.50
576	Charles H. Shaw .....	3,875.00
734	W. H. Roeser .....	7,533.35
731	C. H. Sybert .....	306.00
783	I. N. Putnam .....	7,200.00
729	M. C. Park .....	500.00
728	M. C. Park .....	28.70
804	Thos. H. Owen .....	5,050.00
503	Thos. H. Owen .....	5,050.00
739	S. V. O'Hare .....	5,423.66
675	S. V. O'Hare .....	460.00
788	Nat'l. Ref. & Inv. Co. ....	246.32

Number.	Name of Maker.	Amount.
	Nat'l. Ref. & Inv. Co. ....	100.00
785	H. C. Morgan .....	75.00
713	E. A. McAlpine .....	500.00
755	E. A. McAlpine .....	500.00
637	Wm. D. Appleby .....	12,825.00
503	S. B. Adams .....	60.00
454	Robt. Jordan .....	358.75
542	Robt. Jordan .....	1,000.00
593	Robt. Jordan .....	4,272.27
866	E. F. Cronnin .....	6,060.00
462	M. G. Butler .....	312.50
461	M. G. Butler .....	32.05
750	Amer. Gas Co. ....	3,399.00
749	Amer. Gas Co. ....	4,326.00
787	A. J. Duffy .....	100.00
851	W. A. Denning .....	131.63
772	Exchange Oil Co. ....	25,750.00
879	Exchange Oil Co. ....	316.00
691	Kansas Reduction Co. ....	3,276.00
855	Kansas Reduction Co. ....	1,560.00
655	Kansas Reduction Co. ....	6,673.33
571	Ky. & O. Oil & Refining Co. ....	4,635.00
877	Ky. & O. Oil & Refining Co. ....	7,956.00
318	Landon Inv. Co. ....	8,750.00
881	Landon Inv. Co. ....	14,287.68
876	W. L. Norton .....	28,432.50
867	W. L. Norton .....	8,487.00
560	W. L. Norton .....	40,000.00
319	Jas. A. Menefee .....	9,657.08
774	Madison Oil Co. ....	5,304.50
778	Mutual Investment Co. ....	26,373.31
638	J. E. Tanner .....	10,000.00
858	Genesse Bkg. Co. ....	2,000.00
853	Genesse Bkg. Co. ....	2,001.30
	D. R. Brest .....	455.50
	G. B. Shoenfelt .....	
599	Jno. A. Connolly .....	225.00
717	Jno. A. Connolly .....	150.50

Many of the above notes are also signed by others and are secured by sundry endorsements and collaterals.

### XIX.

That some of said notes and bonds mentioned in the last preceding paragraph hereof were formerly pledged to said Commerce Trust Company of Kansas City as collateral security for the payment of its said note, along with and in addition to the other collaterals hereinbefore mentioned, and were likewise released when said note was paid by the use of the proceeds of said paying bonds, so that your orator, by subrogation, acquired a lien thereon; but as to which of them



were so pledged and released your orator is not advised, and this can be ascertained only by a discovery or an accounting herein.

## XX.

And your orator further shows that he has demanded of the defendants information as to the facts, concerning which a discovery and an accounting are to be asked herein, and they have failed to furnish and he has been unable to obtain the same; also that he has presented his claim to said State Banking Board, which has refused to approve, allow or in any manner respect the same; also that, in taking said property and attempting to hold the same in opposition to your orator's claim and lien, and in seeking to appropriate the same exclusively to other and foreign purposes, said State Banking Board and the members thereof and said Bank Commissioner acted wrongfully and tortiously; and, furthermore, that in said transactions said defendants did not, and in the capacity in which they are sued herein they do not, represent the state. And he says that unless said defendants are enjoined they will make use of his said security for the payment of sundry other persons having claims on funds and assets in their hands, whereby he will suffer great and irreparable injury, for which he would have no remedy at law.

In consideration whereof, and forasmuch as your orator is remediless except in a court of equity, he sues and prays:

1. That the court immediately take jurisdiction of all the matters and things herein above alleged and presented and over all the parties to this bill.

2. That the defendants be enjoined and restrained from making any use or appropriation of said assets and property, or the proceeds thereof, or any portion of the same, during the pendency of this suit or until otherwise ordered by final decree.

3. That the defendants be required to answer, disclose and show: (a) by said Oklahoma Trust Company and the Alamo State Bank, which of the notes and bonds listed in paragraph XVIII were at any time pledged or hypothecated to or with the Commerce Trust Company of Kansas City to secure the indebtedness of said Oklahoma Trust Company and when each of the items so pledged or hypothecated was redeemed or released; (b) by said Alamo State Bank, whether the cash on hand and in banks and cash items of said Alamo State Bank were at any time from the 22nd day of January to the 25th day of August, 1910, less than \$18,018.58, and, if so, how much less; (c) by said Oklahoma Trust Company, the amount of money received by it as the proceeds of said pay-

ing bonds and used by it in discounting notes, purchasing exchange and retiring its obligations, with particulars of each transaction; (d) by said Alamo State Bank, the portion of the \$11,680 deposited to the credit of the Alamo State Bank with the Commerce Trust Company, on or about the 22nd day of January, 1910, and of the \$8,320 received by said Alamo State Bank on or after said date on the check of McNerney endorsed by Jack L. Johnson, making \$20,000 in all, that was used by said Alamo State Bank in discounting notes, purchasing exchange and retiring its obligations, with the particulars of each transaction; and (e) by the same defendant, the nature and amount of assets, and the items thereof, which said Alamo State Bank owned on the 25th day of August, 1910, and the items thereof that were acquired by money expended on or after the 3rd day of January, 1910.

4. That an account be taken of and concerning all the matters and things in connection with which discovery is prayed, and which are the proper subject of an accounting in equity, said Oklahoma Trust Company showing particularly, (a) the various amounts received by it from the sale of paving bonds on any of said twelve districts; (b) the use and disposition made thereof, including, (c) a showing as to amounts paid depositors from said fund, (d) the amount used in redeeming collaterals and the particulars of such collaterals, and (e) the amount which went into the subsequently discounted notes and the particulars of such notes.

5. That on final hearing your orator be adjudged and decreed to have a lien on all of said assets, including cash funds and also collaterals, which were in the possession of the Alamo State Bank on the 25th day of August, 1910, and the proceeds thereof, or so much of the same as in equity and good conscience may appear just, in the hands of said State Banking Board and said Bank Commissioner, prior and superior to any equities or liens in their favor or in favor of those whom they represent, to secure the amount of your orator's debt, as the same may be established in said equity cause 1239, or to secure so much thereof as should be a lien and charge.

6. That your orator be adjudged and decreed fully subrogated, (1) to the rights, liens and equities which the Commerce Trust Company and the Hamilton National Bank, or either of them, formerly held against the notes and bonds, including collaterals, which they surrendered, and which notes and bonds, or their proceeds or assets in which said proceeds were intended, are now in the hands of said State Banking Board and the Bank Commissioner, as herein before alleged, and (2) to the rights of depositors of the Oklahoma Trust

Company who were paid from the proceeds of said paying bonds, or whose payment was assumed and accomplished in consideration of the receipt of such proceeds, so far as the right to funds in the hands of the State Banking Board are concerned, and fixing the amount of such subrogation, for the payment of his debt, as the same may be established in said equity cause 1239.

7. That not only said assets of the Oklahoma Trust Company and the Alamo State Bank, including collaterals held by them, but also all other assets and funds now or hereafter, in the hands of the State Banking Board, including all of those herein before alleged, be decreed subject to a lien in your orator's favor, so far as he is subrogated to the rights of prior lien-holders, or of depositors, to secure the payment of his debt, as the same may be established in said equity cause 1239.

8. That he be adjudged to have been a depositor of said Oklahoma Trust Company, within the meaning of the state guaranty law, to the extent of said \$25,351.63, with all resulting rights and remedies.

9. That he have a decree against said State Banking Board requiring and compelling it to administer said assets in its hands so as to preserve and protect the rights of your orator, as herein shown, and requiring it to pay him the amount ascertained to be owing therefrom and, if necessary, to make assessments for the payment of any balance of his debt, and

10. For such other and further relief as may be agreeable to equity.

And may it please your Honors to grant unto your orator a writ or writs of subpoena directed to the defendants herein above named, thereby commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there, full, true, direct and perfect answer make to all and singular the premises, except that answer need not be made under oath, answer under oath being expressly waived, and to stand, perform and abide by such order, direction and decree as may be rendered against them in the premises, as shall seem meet and agreeable in equity.

And your orator will ever pray.

A. L. BEATY.  
*Solicitor for Plaintiff.*

## EXHIBIT A.

Whereas, I, Peter J. McNerney, have certain street paving contracts in the City of Muskogee, Oklahoma, and have contracted with The Texas Company for the asphalt required in said work and for the use of a paving plant and two steam rollers, which are now in my possession, and I am to pay said company for such asphalt, delivered at Muskogee, twenty-eight dollars per ton of 2000 pounds, including light cooperage, and for the use of said equipment, a rental equal to interest on \$16,000.00 at the rate of ten per cent per annum, and which is to run from the 1st day of December, 1908, and, in addition thereto, five cents for each square yard of pavement so laid, I to keep said equipment in good condition and repair, and,

Whereas, said work is to be paid for largely in bonds to be issued by said City against abutting property, and these bonds cannot be issued at once, and I have requested said company by advancing funds to aid me in the completion of said work, and said company is about to advance three thousand five hundred Dollars and will advance from time to time such further sums as it, in its discretion, may consider expedient to be used in the completion of said contracts and payment of bills incurred:

Therefore, in consideration of the premises, I hereby covenant and agree that, out of the first receipts from or under said contracts, there shall be repaid to said company all sums so advanced, with interest from date of advancement at the rate of ten per cent per annum; also all amounts owing or to be owing for asphalt or other supplies, which last mentioned amounts shall also bear interest at said rate after thirty days from date of invoice; and also all amounts owing or to be owing for the use of said equipment or in connection therewith. And for the purpose of securing such indebtedness now or hereafter owing, there is hereby pledged, assigned and set over to said The Texas Company all bonds to be issued for said work and all amounts owing or to become owing to the Contractor on account of said contracts and all materials and supplies now or hereafter on hand, with full power to sell or otherwise dispose of the same at public or private sale, upon five days' notice to me and the Oklahoma Trust Company, and apply the proceeds on the secured indebtedness; and said Company may place its representatives in charge of said work and direct and control the same and charge the reasonable salaries of such representatives and other expenses thereof to my account, the same to be secured as the other items and to be paid out of first receipts as aforesaid.

Witness my hand this the 5th day of January, 1909.

(Signed) PETER J. McNERNEY.

Witnesses: (Signed) W. B. Brundy.

We hereby guarantee payment when due of all amounts owing or to become owing by Peter J. McNerney under the foregoing contract or under the agreements recited therein.

(Signed) CHARLES H. SHAW by  
P. J. McNERNEY, his agent,  
J. H. HUCKLEBERRY,  
J. B. JONES,

By W. B. BRUNDY, Atty.,  
THOS. H. OWEN.

Witness to all: (Signed) W. B. Brundy.

The undersigned consents to, and, as far as possible, joins in both of the foregoing obligations.

(Signed) The McNerney Company,  
By P. J. McNERNEY, *President*.

Witnesses: (Signed) W. B. Brundy.

The undersigned hereby agrees that any pledge or lien it has or may acquire shall be subordinate to the rights of The Texas Company under the foregoing agreements, and it hereby contracts with The Texas Company to buy and pay for all bonds issued under said paving contracts at ninety-cents on the dollar of their par value, same to be accepted and paid for within five days after they are tendered.

(Signed) Oklahoma Trust Company,  
By A. T. ALISON, *Cashier*.

Witnesses: W. B. Brundy.

The Texas Company hereby accepts the foregoing contracts and guaranties, and, on the strength thereof, makes the stated advancements, and also agrees that the Oklahoma Trust Company may have the aforesaid bonds at ninety cents on the dollar.

(Signed) The Texas Company,  
By A. L. BEATY, *Attorney*.

#### EXHIBIT B.

Whereas, subsequent to the execution by the undersigned of the contract of the 5th day of January, 1909, Peter J. McNerney entered into a contract with the City of Muskogee, Oklahoma, for the paving of the unpaved portions of Denver Avenue from the west line of Eleventh Street to the east line



of Fourteenth Street, and of Thirteenth Street from the north line of Elgin Avenue to the south line of Boston Avenue, known as paving district No. 45, and The McNerney Company has entered into contract with said city for the paving of certain other streets therein, known as paving districts Nos. 15A, 15B, 64 and 66, and these contractors have contracted with The Texas Company for the asphalt required in said work, and for the use of a paving plant and two steam rollers, which are now in their possession, and are to pay said company for such asphalt, delivered at Muskogee, twenty-eight dollars per ton of 2,000 pounds, including light coop-  
erage, and for the use of said equipment a rental equal to interest on sixteen thousand dollars at the rate of ten percent per annum during the time said equipment is held for said purpose, and in addition thereto five cents for each square yard of pavement so laid, they, the said contractors, to keep said equipment in good condition and repair, and

Whereas, said work is to be paid for largely in bonds to be issued by said city against abutting property, and these bonds cannot be issued at once, and said contractors have requested said company, by advancing funds, to aid them in the completion of said work, and said company is about to advance such sum as in its discretion it may be safe to so invest in the completion of said contracts;

Therefore, in consideration of the premises, said Peter J. McNerney and The McNerney Company do hereby, jointly and severally, covenant and agree that out of the first receipts from or under said contracts there shall be repaid to said company all sums so advanced, with interest from date of advancement at the rate of ten per cent per annum; also all amounts owing or to become owing for asphalt or other supplies, which last mentioned amounts shall also bear interest at said rate after thirty days from date of invoice; and also all amounts owing or to become owing for the use of said equipment or in connection therewith.

And for the purpose of securing such indebtedness now owing or hereafter to become owing, there is hereby pledged, assigned and set over to said The Texas Company all bonds to be issued for said work and all amounts owing or to become owing to said contractors on account of said contracts and all materials and supplies now on hand or hereafter to be on hand, with full power to sell or otherwise dispose of the same at public or private sale, upon five days' notice to said contractors and to the Oklahoma Trust Company, and apply the proceeds on the secured indebtedness; and said company may place its representatives in charge of said work

and direct and control the same, and charge the reasonable salaries of such representatives and other expenses herewith to the account of said contractors, the same to be secured as the other items and to be paid out of the first receipts as aforesaid, and in the name of said contractors or either of them said company or its representatives may receipt for bonds or moneys owing or to become owing and execute all necessary or proper stipulations, agreements and bonds in and about the premises, and may do any and all acts that could be done by said contractors or either of them.

Witness our hands, this the 14th day of June, 1909.

(Signed) The McNerney Company,  
By P. J. McNERNEY, *Pres.*

Attest: J. H. HUCKLEBERRY, *Secretary*,  
PETER J. McNERNEY.

Witnesses: (Signed) J. A. Handy.

We hereby guarantee payment when due of all amounts owing or to become owing under the foregoing contract or under the agreements recited therein.

(Signed) P. J. McNERNEY,  
J. H. HUCKLEBERRY,  
J. B. JONES.

Witnesses: (Signed) J. A. Paulhamus.

The undersigned hereby agrees that any pledge or lien it has or may acquire shall be subordinate to the rights of The Texas Company under the foregoing agreements, and it hereby contracts with The Texas Company to buy and pay for all bonds issued under said paving contracts at ninety cents on the dollar of their par value, same to be accepted and paid for within five days after they are tendered.

(Signed) Oklahoma Trust Company,  
By J. B. JONES.

Witnesses: (Signed) J. A. Paulhamus.

The Texas Company hereby accepts the foregoing contracts and guaranties, and on the strength thereof makes the stated advancements and also agrees that the Oklahoma Trust Company may have the aforesaid bonds at ninety cents on the dollar as proposed.

(Signed) The Texas Company,  
By A. L. BEATY, *Attorney*.

## EXHIBIT C.

*The State of Texas, County of Harris.*

*Know All Men by These Presents:* That, The Texas Company, a corporation of Texas, acting by and through its vice-president, who is hereunto duly authorized, for a valuable consideration does hereby transfer, assign and set over unto W. S. Farish, of Harris County, Texas, its entire claim and all causes of action against Peter J. McNerney, The McNerney Company, J. H. Huckleberry, J. B. Jones, Thos. H. Owen, Chas. H. Shaw, and The Oklahoma Trust Company, all of the State of Oklahoma; and this transfer shall be given full force and effect whether such claims or causes of action are single or several, and whether the same are primary or collateral, it being the intention hereof to effect a transfer of all claims and causes of action which The Texas Company has against said parties, or either of them. And it hereby guarantees unto the said W. S. Farish the payment of said claims to the extent of \$180,000.00, with interest from this date at the rate of six per cent per annum.

Executed in duplicate, each party taking an original, this the 9th day of December, 1909.

(Signed) The Texas Company,  
By E. C. LUFKIN, *Vice-President.*

Accepted: (Signed) W. S. Farish.

Endorsed: Filed Oct. 12, 1910, L. G. Disney, Clerk of the United States Circuit Court, Eastern District Oklahoma.

And, to-wit, on the 12th day of October, A. D. 1910, by order of Praecipe filed by complainant herein, Chancery Subpoena was issued for Alamo State Bank, a corporation, Oklahoma Trust Company, a corporation, The McNerney Company, a corporation, and P. J. McNerney, which said Subpoena with the Marshal's Return thereon is in words and figures as follows:

**Chancery Subpoena.**

*United States of America, Eastern District of Oklahoma—ss.*

THE UNITED STATES OF AMERICA,

*To Alamo State Bank, a Corporation; Oklahoma Trust Company, a Corporation; The McNerney Company, a Corporation; and P. J. McNerney, Greeting:*

We command you and every one of you, that you appear before our Judge of our Circuit Court of the United States

of America for the Eastern District of Oklahoma, at the City of Muskogee, in said District, on the first Monday in the month of November, next, to answer the Bill of Complaint of W. S. Farish this day filed in the Clerk's office of said Court in said City of Muskogee, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

*To the Marshal of the Eastern District of Oklahoma to Execute.*

*Witness*, The Hon. John M. Harlan, Acting Chief Justice of the Supreme Court of the United States of America, at the City of Muskogee, in said District, this 12th day of October, A. D. 1910.

L. G. DISNEY, *Clerk.*

(Seal)

By H. E. BOUDINOT, *Deputy Clerk.*

*Memorandum*—The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of Muskogee aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

L. G. DISNEY, *Clerk.*

(Seal)

By H. E. BOUDINOT, *Deputy Clerk.*

#### U. S. MARSHAL'S RETURN.

*Eastern District of Oklahoma—ss.*

Received the within writ October the 15th, 1910, and executed the same as follows, to-wit: Served on the within named defendant, The Alamo State Bank, on the 22nd day of October, 1910, by delivering a true copy thereof to W. H. Pritchert, cashier of the above named corporation, at Muskogee, Okla., its president, vice president, chairman of board of directors or other chief officer, its treasurer, secretary, clerk or managing agent not being found in my district.

Also on the Oklahoma Trust Co., on Oct. 22, 1910, by delivering a true copy thereof to William Bundy, cashier, of the above corporation at Muskogee, Okla., the president or other chief officer not being found in my district.

Also on the McNerny Company on October 29, 1910, by delivering a true copy to P. J. McNerny, president of the above named corporation, at Muskogee, Okla.

Also on P. J. McNerny on the 29th day of October, 1910, at Muskogee, Okla., by delivering a true copy to him, personally.

S. G. VICTOR, *U. S. Marshal.*

By J. W. HUBBARD, *Deputy.*

Endorsed: Filed Nov. 1, 1910, L. G. Disney, Clerk United States Circuit Court, Eastern District Oklahoma.

And, to-wit, on the 7th day of January, A. D. 1911, the defendant, State Banking Board, filed Demurrer to the Bill of Complainant, which is in words and figures as follows:

**Separate Demurrer of the State Banking Board.**

Now comes the State Banking Board, a body corporate or organization under the laws of the State of Oklahoma, composed of the Governor, the Lieutenant Governor, the President of the Board of Agriculture, the State Treasurer and the State Auditor, and C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, the persons who now compose said Board, and for demurrer to the Bill of Complaint filed herein says that this court is without jurisdiction to maintain this action against the said State Banking Board for the reason that this suit is in effect an action against the State of Oklahoma for the reason that under the laws of the State of Oklahoma under which said State Banking Board is operating, the State of Oklahoma has and holds a lien against all of the assets which formerly belonged to the Oklahoma Trust Company and the Alamo State Bank, for the reimbursement of the State Guaranty Fund made by order and direction of the State Banking Board in the course of liquidation of the said Alamo State Bank and the Oklahoma Trust Company, said liquidation of said banks having taken place in the due course of the administration of the duties and powers conferred on said Banking Board by the laws of the State of Oklahoma, and that this court is wholly without jurisdiction and power to maintain this action against the State Banking Board and each and all of the members composing the same have, hold and maintain their legal status and residence at the seat of government of the State of Oklahoma, which at all the dates and times mentioned in said Bill of Complaint was in the Western District of the State of Oklahoma, and not in the Eastern District of the State of Oklahoma.

*Second.* For further demurrer to said Bill of Complaint the said defendants say that said Bill does not state any cause of action in favor of the plaintiff and against this defendant, nor does the said Bill of Complaint state such a case as does or ought to entitle the plaintiff to the discovery prayed for or to the relief thereby sought and prayed for against the said defendant.

*Wherefore*, and for divers other errors and imperfections appearing in said bill, this defendant humbly demands the judgment of this honorable court whether he shall be required to make any other or further answer to said bill or any of the matters and things therein contained and prays

that he be dismissed with his reasonable costs in this behalf expended.

**STATE BANKING BOARD;**

C. N. HASKELL, *Governor;*

G. W. BELLAMY, *Lieutenant Governor;*

J. P. CONNORS, *President of the Board  
of Agriculture;*

J. A. MENEFFEE, *State Treasurer;*

M. E. TRAPP, *State Auditor.*

By LEDBETTER, STUART & BELL,  
*Counsellors.*

I, W. A. Ledbetter, being first duly sworn, on oath say that I am one of the counsellors for the defendant, E. B. Cockrell, Bank Commissioner; that the said E. B. Cockrell, as Bank Commissioner, has taken charge of the affairs of the Alamo State Bank, to administer the same under the laws of the State of Oklahoma, and that the foregoing demurrer is not interposed for delay. W. A. LEDBETTER, *Counsellor.*

Subscribed and sworn to before me on this the 17th day of December, 1910. Florence Thurmond,

(Seal)

Notary Public.

My Commission expires April 28, 1913.

Endorsed: Filed Jan. 7, 1911, L. G. Disney, Clerk United States Circuit Court, Eastern District Oklahoma.

And, to-wit, on the 2nd day of January, A. D. 1912, the same being one of the days of the regular Chickasha 1911 term of the United States Circuit Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Muskogee, Oklahoma, as of and for the Chickasha term thereof. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following, to-wit:

**Order Overruling Demurrers.**

Now, on this 13th day of November, 1911, coming on to be heard, in open court, the demurrers of each of the defendants filed herein, and the court being fully advised in the premises, doth overrule said demurrers and each of them, to which ruling of the court the defendants and each of them except.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Nov. 13, 1911, L. G. Disney, Clerk United States Circuit Court, Eastern District Oklahoma.



And, to-wit, on the 2nd day of January, A. D. 1912, the defendants, State Banking Board and the Bank Commissioner, filed their Answer, which is in words and figures as follows:

*In the United States Circuit [District] Court for the Eastern District of Oklahoma.—W. F. Farish, Plaintiff, v. The State Banking Board et al., Defendants.—In Equity.*

**Answer.**

The Answer of the State Banking Board, a body corporate organized under the laws of the State of Oklahoma, composed of the Governor, the Lieutenant Governor, the President of the Board of Agriculture, the State Treasurer, State Auditor of said State, C. N. Haskell, George W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, the respective persons who composed said Banking Board at the time this suit was instituted, and E. B. Cockrell, Bank Commissioner of the State of Oklahoma, to the Bill of Complaint herein.

**I.**

These defendants, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the Bill, come and answer thereto, or to so much thereof, as they are advised is material to the answer, and say:

That they admit the execution of a contract on the 22nd day of July, 1908, between the Texas Company, a corporation, and P. J. McNerney, as set forth in the first paragraph of the Bill of Complaint herein, and that said contract pertained to certain street paving of the City of Muskogee, and that said parties entered into certain other contracts relating to street paving, on the 5th day of January, 1909, and on the 14th day of June, 1909, whereby and wherein it was among other things stipulated and agreed that for the purpose of securing the indebtedness, present and future, of said McNerney and the McNerney Company to the Texas Company, there was pledged, assigned and set over to the latter, all bonds issued for the street paving, and all amounts owing or to become owing to said contractor on account of said contracts, and wherein and whereby it was attempted to be agreed by the Oklahoma Trust Company that any pledge or lien it had or might acquire, should be subordinate to the rights of said Texas Company, and the said defendants further admit that true and correct copies of said contracts last mentioned are attached to the Bill of Complaint herein and marked as "Exhibits A and B", but these defendants deny that said contracts marked as Exhibits A and B were never binding upon the Oklahoma



Trust Company insofar as they attempted to subordinate the lien and claim of the Oklahoma Trust Company on the bonds to be issued by the City of Muskogee in payment for street paving, and with respect to said contracts defendants allege and charge that the contract dated January 5, 1909, referred to as "Exhibit A", was not signed for the Oklahoma Trust Company by any officer or other person authorized to sign and execute the same; that said contract purports to be signed by A. T. Allison, Cashier, but in truth and in fact, and as a matter of law, the said Allison was without authority to sign said contract. That said contract was never authorized by the Board of Directors of said company, or in any way ratified or confirmed by said Oklahoma Trust Company.

With respect to the contract of June 14, 1909, referred to in said Bill of Complaint as "Exhibit B", these defendants say:

That said contract purports to be signed by J. B. Jones; that while said J. B. Jones was President of said company at said time, he was wholly without authority to execute the same for said Oklahoma Trust Company, and the subject matter of said contract was not within the scope of his duties as President of said Company, and said Company never at any time by and through its Board of Directors, or otherwise, authorized him to execute the same, nor was the same ever ratified or confirmed by the Oklahoma Trust Company; that, therefore, the said Texas Company never acquired or held any lien as against the Oklahoma Trust Company, on or against bonds issued, and thereafter issued, in payment of said street paving. That at the time of the execution of said contracts P. J. McNerney and the McNerney Company were largely indebted to the Oklahoma Trust Company in the sum of, to-wit, about Ninety Thousand Dollars (\$90,000.00), and for the security of said indebtedness, the said P. J. McNerney and the McNerney Company had, prior to the execution of said contracts referred to as "Exhibits A and B", transferred and assigned to the Oklahoma Trust Company a first lien on all paving bonds to be issued, paid and delivered to them under said paving contracts, and that said first lien was at the time of the execution of said contracts marked "Exhibits A and B", in full force and effect, and is still in full force and effect as against the said P. J. McNerney, the McNerney Company and the Texas Company, as well as against the plaintiff herein.

## II.

For their answer to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth,

fifteenth, sixteenth, seventeenth and eighteenth paragraphs of said Bill of Complaint, these defendants say:

That they are without information as to the deposits, payments, and certificates of deposits therein mentioned, and, therefore, neither deny nor admit the same in the manner and form as alleged in said Bill of Complaint.

These defendants admit that the Alamo State Bank, on January 3, 1910, purchased certain assets from the Oklahoma Trust Company, and assumed payment of certain deposits owing by the Oklahoma Trust Company to its customers, amounting to the sum of Four Hundred Forty-eight Thousand Five Hundred Eighty-three and 55/100 Dollars (\$448,583.55). That the contract between the Oklahoma Trust Company and the Alamo State Bank was in writing, and a copy of the same is hereto annexed, marked "Exhibit A", and made a part hereof. That said contract represents the true agreement and obligations assumed by the parties thereto.

These defendants admit, as alleged in the 14th paragraph of the Bill of Complaint herein, that from and after the 1st day of November, 1909, and a long time prior thereto, said Oklahoma Trust Company was insolvent, but this was unknown to the depositors and the public. And the defendants allege that said Trust Company was, in fact, insolvent on January 1, 1909, and at all times thereafter, which fact was unknown to the public.

The defendants further admit and allege that the transfer of the assets from the Oklahoma Trust Company to the Alamo State Bank, on January 3, 1911, was at the instance, request and demand of the Bank Commissioner of the State of Oklahoma; and the transfer of said assets in the manner set forth in said contract was the means and plans adopted by said Trust Company, under the direction of the said Bank Commissioner, to liquidate its affairs, and pay to its depositors.

The defendants further admit that on the 31st day of August, 1910, the Alamo State Bank became insolvent, and allege that the said Alamo State Bank had been, in fact, insolvent ever since the 3rd day of January, 1909; that its insolvent condition was produced by the purchase of certain assets from the Oklahoma Trust Company, as set forth in the contract of said date, and the assumption of the payment of deposits, amounting to the sum of Four Hundred Forty-eight Thousand Five Hundred Eighty-three and 55/100 Dollars (\$448.583.55).

The defendants further admit that both of said banks were operating under the Bank Guaranty Law of the State

of Oklahoma, and were subject to all of its requirements and provisions, and subject to such rules and regulations, with respect to the Bank Guaranty Fund, as were imposed by the Banking Board of the State of Oklahoma.

The defendants admit that on the said 25th day of August, 1910, the said Alamo State Bank, being in a state of insolvency, was taken into the custody of the Bank Commissioner of the State of Oklahoma, and that said Bank Commissioner on said day and date took charge and custody of all of its books, records and assets of every kind and character, and on or about said day and date transferred and sold the same to the Union State Bank of Muskogee, Oklahoma, pursuant to an order of sale issued by the District Court of Muskogee County, in the State of Oklahoma. That said sale of the assets of said Alamo State Bank was made pursuant to an agreement between the Union State Bank and the Bank Commissioner and the Banking Board of the State of Oklahoma, whereby the said Union State Bank assumed and agreed to pay the deposits owing by the Alamo State Bank, amounting to the sum of Four Hundred Fifty Thousand Dollars (\$450,000.00), and whereby the said Bank Commissioner and the Banking Board of the State of Oklahoma agreed to guarantee the solvency of the assets of said Alamo State Bank to the extent and for sufficient amount to pay all of the deposits assumed by said Union State Bank, and to protect said Union State Bank against loss in the premises. That pursuant to said agreement and arrangement, the said Banking Board of the State of Oklahoma, on or about the 25th day of August, 1910, advanced to the said Union State Bank the sum of Fifty Thousand Dollars (\$50,000.00), and from time to time since said date the said Banking Board of the State of Oklahoma has advanced to the Union State Bank, pursuant to said contract and arrangement, the additional sum of One Hundred Fifty Thousand Dollars (\$150,000.00). All of said advancements and payments being made in the course of the liquidation of the assets of the Alamo State Bank and the Oklahoma Trust Company, after they were transferred and assigned to the Alamo State Bank, and in the discharge of the obligation assumed by the Alamo State Bank to pay the deposits of the Oklahoma Trust Company.

That under the law, the State of Oklahoma, for the benefit of the Depositors' Bank Guaranty Fund, has a first lien on all of the assets of the Oklahoma Trust Company and the Alamo State Bank for the reimbursement of the said sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), loaned and paid, as aforesaid, to the Union State Bank, in the payment of the deposits assumed by it. Which said lien, on be-

half of the state, is superior to any lien claimed or held by the plaintiffs herein, under and by virtue of the assignment of January 3, 1909, June 3, 1909, of certain bonds, thereafter to be delivered under the paving contract set forth in the 1st paragraph of the Bill of Complaint herein. The defendant, the State Banking Board of the State of Oklahoma, has a right, under the law, to enforce the prior lien on behalf of the State of Oklahoma, against any and all of said assets, which were transferred to the Alamo State Bank by the Oklahoma Trust Company, and by said Alamo State Bank to the Union State Bank.

The defendants deny that the certificate of deposit issued by the Hamilton National Bank and held by the Oklahoma Trust Company was paid off in full or in part by the proceeds of the bonds or other property on which the plaintiff has, or ever had, a lien. And likewise deny that any of the money or property of the plaintiff was used to pay any indebtedness owing by the Oklahoma Trust Company to the Commerce Trust Company, and deny that the said plaintiff has, or ever had, any lien by way of subrogation, or otherwise, against any of the securities or assets pledged by the Oklahoma Trust Company to the Hamilton National Bank or the Commerce Trust Company, as alleged in said Bill of Complaint.

Having thus made full answer to all of the matters and things contained in said Bill, which these defendants can conceive it necessary to be answered, they pray that they be dismissed hence, with their costs.

LEDBETTER, STUART & BELL,

*Solicitors for Defendants.*

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AGREEMENT.

*This Agreement, Made and entered into this 3rd day of January, A. D. 1910, by and between Alamo State Bank, of Muskogee, Oklahoma, Party of the First Part, hereinafter called the Bank, and Oklahoma Trust Company, of Muskogee, Oklahoma, Party of the Second Part, hereinafter called the Trust Company, witnesseth:*

That, Whereas, the Bank desires to purchase, and the Trust Company desires to sell its banking business;

Now, Therefore, For and in consideration of the sum of One Dollar (1.00) each to the other paid, receipt of which is hereby acknowledged, and the covenants and agreements hereinafter mentioned and set forth to be done and performed by

each of the parties hereto, as herein set forth, the Bank hereby assumes and agrees to pay the depositors of the Trust Company the following amounts, to-wit:

Deposits of Individuals .....	\$216,991.66
Deposits of Banks .....	191,915.28
Time Certificates of Deposit .....	81,560.87
Demand Certificates of Deposit .....	65,250.00
Cashiers Checks .....	146.97
Certified Checks .....	1,285.12
Money Orders .....	3,830.00

a total of \$560,979.90, less deposits set forth and shown in Schedule A hereto attached and made a part hereof.

The Trust Company hereby sells and delivers to the Bank its assets, as set forth and shown in Schedule B hereto attached and made a part hereof.

The Trust Company represents that a portion of its assets set forth in schedule "B" is now held by the Hamilton National Bank of Chicago, Illinois, as collateral to secure the payment of the Trust Company's Certificate of Deposit for the sum of \$50,000.00 owned by said Hamilton National Bank, and said collateral is hereby assigned to the Bank for the purposes herein set forth.

The Trust Company further represents that a portion of its assets set forth in Schedule "B" is now held by the Commerce Trust Company, of Kansas City, Missouri, as collateral to secure the payment for an indebtedness of \$40,000.00 due by the Trust Company to the Commerce Trust Company; that the Trust Company hereby agrees to pay said \$40,000.00 and to deliver to the Bank such portion of its assets as are set forth in Schedule "B", that same are hereby assigned to the Bank.

It is further agreed that the sales, transfers, deliveries herein provided for shall take place on January 3rd, 1910, that the Trust Company's assets set forth in Schedule "B" shall then be turned over and delivered to the Bank; that for the purpose of permitting the selection by the Bank of the Bills Discounted of the Trust Company, to the amount set forth in Schedule "B", it is agreed that all of the Bills Discounted of said Trust Company shall be delivered to the Bank; that the Bank shall, within sixty days from this date, select Bills Discounted to the amount of \$336,682.13, as set forth in Schedule "B", the same to be valued at present worth of same on January 1st, 1910, that the Bills Discounted so selected shall be retained in the Bank and be the property of the Bank; the Bank is further authorized to retain and

collect all Bills Discounted, apply the proceeds in payment of Bills Discounted selected, and to retain the balance as collateral security to guarantee the payment, as hereinafter set forth, of the Bills Discounted selected by said Bank.

The Trust Company hereby guarantees the payment of each of its notes or Bills Discounted selected by the Bank, as hereinbefore provided for, together with interest thereon; that this guarantee extends to and covers all extensions or renewals of any notes or part thereof made upon request of the Trust Company.

The Bank further agrees, upon request of the Trust Company, to extend any of said notes for a term or terms not exceeding, in the aggregate, six months, at a rate of interest to be fixed by the Bank not exceeding eight per cent per annum; that the Trust Company hereby guarantees the correctness of all of its accounts.

The Trust Company further agrees to sell and deliver to the Bank the fixtures of the Trust Company now in its banking room for the sum of \$7,507.40, and that the Bank may select said fixtures at said price in place of a like amount of Bills Discounted or notes of the Trust Company, as set forth in Schedule "B", the Bank to have the right to purchase said fixtures for a period of ten days. The Trust Company further agrees that in the event said Bank purchases said fixtures that it will, upon the demand of the Bank made at said time, cause the Canadian Valley Building Company to execute a lease on the south half of the first floor of its building to the Bank, for a term of five years, at a fixed rental of \$250.00 per month, the Bank to have the privilege of renewing said lease for a further term of five years at the same rental. Said lease further providing for a further renewal by the Bank for a period of five years upon a rental value to be adjusted in accordance with the increase in valuation of said premises.

*In Witness Whereof*, the parties hereunto caused their corporate names to be attached by their officers, properly thereunto directed by the Board of Directors of each of said Companies, and attested by the seal of each of said Companies.

ALAMO STATE BANK,

Attest:

W. H. PRITCHETT, *Secy.*

By W. C. JACKSON,

*Vice-President.*

Attest:

OKLAHOMA TRUST COMPANY,

W. B. BUNDY, *Secy.*

By J. B. JONES, *Pt.*

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## SCHEDULE "A"

Being a list of the deposits of the Oklahoma Trust Company not assumed by the Alamo State Bank:

Mid-Continent Life Insurance Company.....	\$19,816.16
Commerce Trust Company, Collection Account...	271.66
The McNerney Company, Special Account.....	2,548.60
Oklahoma Trust Company, Trustee Account.....	25,351.63
J. A. Paulhamus, Special Account.....	4,700.00
C. H. Shaw.....	82.91
I. N. Putnam.....	2,420.00
J. B. Jones, Special Account.....	900.00
Night & Day Bank Account.....	56,303.57
Total of .....	<u>\$112,394.53</u>

## SCHEDULE "B"

Being a statement of the Assets of the Oklahoma Trust Company sold and delivered to the Alamo State Bank:

Cash .....	\$12,806.69
Sight Exchange, following banks:	
Hamilton National Bank, Chicago.....	7,785.17
Commerce Trust Company, Kansas City.....	10,542.40
Gate City National Bank, Kansas City.....	752.83
First National Bank, Muskogee.....	1,901.22
National Park Bank, New York City.....	6,223.70
Central National Bank, St. Louis.....	1,960.58
First National Bank, Tulsa.....	187.05
Sundry Banks, Collection Account.....	7,840.36
Bonds and Warrants.....	13,483.96
Memorandum of Indebtedness of Mid-Continent Life Insurance Company.....	18,239.28
Bills Discounted of Oklahoma Trust Company to be Selected as Set Forth in Accompanying Instrument, to the Amount of.....	<u>336,862.13</u>
Total Assets .....	<u>\$448,585.37</u>

Endorsed: Filed Jan. 2, 1912, R. P. Harrison, Clerk United States District Court, Eastern District Oklahoma.

And, to-wit, on the 11th day of January, A. D. 1912, the same being one of the days of the January 1912 term of the United States District Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Muskogee, Oklahoma. Present and presiding the Honorable Ralph E. Campbell, Judge. Among the proceedings had on this day is the following, to-wit:



*United States District Court, Eastern District of Oklahoma, at Muskogee.—W. S. Farish, Plaintiff, Versus State Banking Board et al., Defendants.—No. 1475, In Equity.*

**Order Allowing Amendment to Bill and Supplemental Bill and Making Union State Bank Party Defendant.**

On this the 11th day of January, 1912, it is ordered that the plaintiff have leave to file his first amendment to his original bill of complaint herein and also his first supplemental bill of complaint, and that the clerk issue chancery subpoena to the defendant Union State Bank, now made a party defendant, requiring it to answer said original bill of complaint and said amendment thereto and said supplemental bill of complaint, as provided by the rules; and the other defendants having previously appeared herein, it is ordered that they and each of them shall, if further answer is deemed necessary, make answer to said amendment and the supplemental bill of complaint on or before the rule day in February, plaintiff's solicitor being required, at least twenty days prior to said rule day, to serve a copy of said amendment and said supplemental bill of complaint on the solicitors of the defendants who have answered. RALPH E. CAMPBELL, *Judge*.

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk United States District Court, Eastern District Oklahoma.

And, to-wit, on the 11th day of January, A. D. 1912, the complainant filed his First Amendment to the Bill of Complaint, which is in words and figures as follows:

**First Amendment to Bill of Complaint.**

*To the Honorable, the Judges of the District Court of the United States for the Eastern District of Oklahoma:*

Now comes the plaintiff and, with leave of the court first obtained, brings this his first amendment of his original bill of complaint against the defendants herein.

And thereupon your orator complains and makes amendment as follows:

*First.* Amend by inserting in the introduction after "Bank Commissioner" the words "the Union State Bank" so as to make the Union State Bank a party defendant.

*Second.* After paragraph XX and preceding the prayer add one paragraph as follows:

**XXI.**

And your orator further shows that the defendant, the Union State Bank, a corporation having its principal office

and place of business in the City of Muskogee and being a citizen of Oklahoma as aforesaid, claims to have purchased and acquired the notes, bonds, money, and assets hereinbefore mentioned from said Bank Commissioner on or about the 25th day of August, 1910; that said Union State Bank did, on or about said date, take possession of said property and the place of business and all money and property of the defendant Alamo State Bank; that it has since collected some of the notes and obligations mentioned in the bill of complaint herein, but the particulars are wholly unknown to your orator; and that when it acquired or pretended to acquire said money and property said Union State Bank had notice of the facts alleged in said bill of complaint and the rights of your orator and took subject to your orator's claim.

*Third.* Amend the prayer by adding to the third section thereof subdivision f, reading, "and by the Union State Bank the items and amounts of notes and obligations listed in said bill of complaint which it has collected and the date of collection"; and in sections 5, 6 and 7 the words "or said Union State Bank" after "the State Banking Board and said Bank Commissioner" and "the State Banking Board", as these and similar expressions occur, so that the decree may run against the money and property in the hands of the defendant, Union State Bank.

Wherefore, your orator prays as he has heretofore prayed in his original bill of complaint.

And may it please your honors to grant unto your orator a writ or writs of subpoena directed to the defendant, the Union State Bank, thereby commanding it at a certain time and under a certain penalty therein to be limited personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, including answer to said original bill of complaint and the amendments and supplement thereto, except that answer need not be made under oath, answer under oath being expressly waived, and to stand, perform, and abide by such order, direction, and decree as may be rendered against it in the premises, as shall seem meet and agreeable in equity.

Your orator will ever pray.

F. B. DILLARD,

A. L. BEATY,

*Solicitors for Plaintiff.*

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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And, to-wit, on the 11th day of January, A. D. 1912, the Complainant filed his First Supplemental Bill of Complaint, which is in words and figures as follows:

**First Supplemental Bill of Complaint.**

*To the Honorable, the Judges of the District Court of the United States for the Eastern District of Oklahoma:*

Now comes the plaintiff, W. S. Farish, and, with leave of court first obtained, brings this his first supplemental bill of complaint against the State Banking Board, a body corporate under the laws of the State of Oklahoma, sometimes referred to as the "Banking Board", which said board, as now constituted under the present statutory law of said state, is composed of the Governor and two members appointed by the governor, and of the Bank Commissioner of said state, who, under the present law, is ex officio secretary of said board; against the Union State Bank, a corporation; the Alamo State Bank, a corporation; the Oklahoma Trust Company, a corporation; The McNeerney Company, a corporation, and P. J. McNeerney,—said Union State Bank being a citizen of the State of Oklahoma and this day made a party defendant in said cause, defendants.

And thereupon your orator complains and says:

That on or about the 9th day of October, 1910, your orator filed herein his original bill of complaint against the said defendants, except the Union State Bank, for the purpose of obtaining a discovery, an accounting, and an injunction; also to establish and enforce a lien in his favor on certain money and property transferred by the Oklahoma Trust Company to the Alamo State Bank on or about the 3rd day of January, 1910, to secure the payment of such judgment as he might obtain in equity cause 1239, entitled W. S. Farish vs. P. J. McNeerney et al., then pending in this court; also for subrogation to certain liens of the Hamilton National Bank of Chicago and the Commerce Trust Company of Kansas City on certain notes and bonds therein described, and for subrogation to the rights of depositors of the Oklahoma Trust Company who were paid from funds to which he was entitled, and that he be adjudged to have been a depositor of said Oklahoma Trust Company in a certain amount as alleged; also for a decree requiring said State Banking Board to administer said assets so as to preserve and protect his rights as shown, and requiring it to pay him the amount ascertained to be owing, and to make necessary assessments; and also for other relief as prayed for in said bill of complaint, to which reference is here made for full particulars; that thereupon the de-

endants demurred to said bill of complaint, but their demurrers were by this court overruled on the 13th day of November, 1911, and said State Banking Board has answered to the merits.

Your orator further shows that since the filing of his said original bill of complaint herein there has been an adjudication of certain matters and issues here involved, binding on all of the parties to this suit, in this, to-wit: On or about the 9th day of October, 1910, said State Banking Board and the Union State Bank, for the purpose of defeating your orator's claim herein asserted, engaged and employed Hon. W. A. Ledbetter and afterwards also Hon. C. B. Stuart, members of the bar of this court, to answer and defend said equity suit 1239, entitled W. S. Farish vs. P. J. McNeerney et al., in the name of said Oklahoma Trust Company and the other defendants therein; that said solicitors, acting under said employment, filed an answer in the name of said defendants, and did so defend; that in the course of the answer so filed it was in substance and effect denied that the stipulations appearing in connection with the instruments dated the 5th day of January and the 14th day of June, 1909, as being signed by the Oklahoma Trust Company, copies whereof are attached to the original bill of complaint herein, were in fact signed by or with the authority of said Oklahoma Trust Company, or that said Oklahoma Trust Company became bound thereby, or its lien and rights subordinated to the claim of your orator, and all of the defenses herein pleaded were there set forth in substance; that all of the other defendants herein, including said Union State Bank, aided in the defense as aforesaid, and endeavored to defeat said suit, and, to avoid being sued, said Union State Bank covenanted with your orator in writing to be bound by the decision therein; that the case was put at issue and testimony taken, and the issue hereinbefore mentioned and other issues were argued by said solicitors; that thereupon on the 5th day of September, 1911, this court rendered its final decree therein, from which no appeal has been perfected, in words and figures in substance as follows:

"On this the 5th day of September, 1911, the same being a day of the regular term of the court, this cause came on for final hearing and decree, pursuant to previous assignment of the cause and due notice to the solicitors of the several parties and each of them, and thereupon came the plaintiff by his solicitor and the defendant Oklahoma Trust Company by its solicitors and announced ready to proceed with the hearing, but the other defendants came not, though duly served with process requiring

them to appear in response to which they had appeared from time to time at various stages of the proceedings.

"The cause was heard upon the plaintiff's original bill of complaint and the amendment thereto and his supplemental bill of complaint and upon the joint and separate answer of defendants, The McNerney Company, Oklahoma Trust Company, P. J. McNerney, and upon the depositions taken in the cause by Ezra Brainerd, Jr., Special Commissioner appointed for that purpose, and upon stipulations filed. In the course of the hearing the plaintiff, through his solicitor, announced that he would not further prosecute as against the defendant, P. J. McNerney, J. H. Huckleberry, J. B. Jones, Thomas H. Owen and Charles H. Shaw, individually and, so far as said defendants were concerned in their individual capacity, dismissed the bill of complaint without prejudice, however, to his cause of action, if any, against them or either of them, which course of the plaintiff was approved by and made the order of the court. And upon consideration of the pleadings of the parties, the evidence adduced and the stipulations filed, the court was of opinion that the plaintiff was entitled to recover according to the prayer of his original and supplemental bills of complaint, and that the defendants had failed to sustain their defenses or any or either of them.

"It was considered and adjudged by the court:

"1. That on or about the 22nd day of July, 1908, the defendant, P. J. McNerney, and The Texas Company entered into a contract for the purchase and sale of asphalt and for the use by said McNerney of certain paving equipment, as alleged in paragraph I of the plaintiff's original bill of complaint.

"2. That thereafter in the latter part of the year 1908, and in the early part of the year 1909, said McNerney and The McNerney Company secured paving contracts in the City of Muskogee, as set out in paragraphs II and III of said bill of complaint, and that the same were for the use and benefit of The McNerney Company as alleged by the plaintiff.

"3. That said The Texas Company and Peter J. McNerney and others and said The Texas Company and The McNerney Company and others, made and entered into contracts on the 5th day of January, 1909, and on the 14th day of June, 1909, as set forth in said bill of complaint, whereby said The Texas Company acquired a lien upon all bonds to be issued to said The McNerney Company or McNerney, and upon any and all amounts

owing or to become owing to them on account of said contract with the City of Muskogee and upon all materials and supplies on hand or thereafter to be on hand, as fully set forth in said bill of complaint, and that on each occasion the defendant Oklahoma Trust Company stipulated and agreed with the other parties in substance and effect that any pledge or lien it had or might acquire should be subordinate to the rights of said The Texas Company under said agreements; and said Oklahoma Trust Company further contracted with The Texas Company to buy and pay for all bonds issued under said paving contracts at ninety cents on the dollar of the par value, same to be accepted and paid for within five days after they should be tendered, as fully alleged in said bill of complaint, by which it was meant that the purchase of said bonds by said Oklahoma Trust Company would be a cash transaction payment to be made simultaneously with its acceptance and retention of such bonds.

"4. That under said contracts The Texas Company advanced various sums of money and furnished material as alleged in paragraph V of its said bill of complaint aggregating, without interest, \$232,517.33, all of which was used in the paving work in the City of Muskogee prosecuted under the aforesaid contracts, and also furnished the paving equipment which was used by said The McNerney Company in the laying of at least 100,000 square yards of pavement, retaining and using said equipment for fifteen months.

"5. That said The McNerney Company paid or caused to be paid to said The Texas Company on the 19th day of April, 1909, the sum of \$19,274.84, and on the 25th day of September, 1909, the further sum of \$27,906.57, and in the month of September, 1910, through the receiver herein the still further sum of \$78,027.94, and that save and except these payments said defendant has wholly failed and refused to pay said indebtedness and the same is wholly unpaid.

"6. That during said year of 1909 paving bonds on which said The Texas Company held lien, as hereinbefore stated, were issued by the City of Muskogee and were delivered to said Oklahoma Trust Company, or came into said last mentioned defendant's possession and under its control; that prior to the first day of December, 1909, said Oklahoma Trust Company sold a portion of said bonds at ninety-one cents on the dollar of their face with accrued interest, and, after deducting and paying all expenses and charges against the same, including one



per cent to itself, said Oklahoma Trust Company held in its possession on the 1st day of December, 1909, a balance of the proceeds of said bonds amounting to \$25,351.63; and that prior to the 7th day of January, 1910, it sold the remainder that had come into its possession as aforesaid at the same price and, after deducting such charges and one per cent to itself, there remained on the 7th day of January, 1910, in its possession of said proceeds the sum of \$63,117.85.

"7. That after the execution of the stipulations subordinating the lien of said Oklahoma Trust Company to the lien of said The Texas Company, as hereinbefore shown and as fully alleged in said bill of complaint, said Oklahoma Trust Company ratified the same and was fully bound and obligated thereby.

"8. That the defendants have failed to establish their off-sets, counter-claims and other defenses in whole or in part.

"9. That the plaintiff, W. S. Farish, by transfer in due form is the owner and holder of the claim and cause of action of said The Texas Company.

"10. That all the material allegations of the plaintiff's bill of complaint and the amendment thereto, and his supplemental bill of complaint are fully sustained by the evidence, and are found to be true.

"It is, therefore, ordered, adjudged and decreed by the court that the plaintiff, W. S. Farish, do have and recover of and from the defendant, The McNerney Company, a corporation, the principal and interest of his debt, amounting in all to One Hundred Forty-seven Thousand Eight Hundred Thirty-one (\$147,831.79) Dollars and Seventy-nine cents, on which the funds now in the hands of the receiver, after deducting unpaid allowances, shall be applied as a credit; and that for the balance remaining, to-wit, \$123,545.91, and all costs in this behalf expended, execution shall issue.

"It is further ordered, adjudged and decreed by the court that the defendant, Oklahoma Trust Company, a corporation, do forthwith deliver to said plaintiff said proceeds of paying bonds amounting to Eighty-eight Thousand Four Hundred Sixty-nine (\$88,469.48) Dollars and Forty-eight cents, together with an amount equal to the interest thereon at six per centum per annum, amounting to Eight Thousand Nine Hundred Ten (\$8,910.59) Dollars and Fifty-nine cents, making a total amount to be delivered by said Oklahoma Trust Company to the plain-



tiff of Ninety-seven Thousand Three Hundred Eighty (\$97,380.07) Dollars and Seven cents, which the plaintiff may enforce by appropriate order or writ, and any action which the plaintiff may take looking to the enforcement of this decree shall be without prejudice to his right to follow the proceeds of said paving bonds into other hands, or to enforce any legal or equitable remedy which he may have for the collection of his debt or the enforcement of his rights.

"It is further ordered, adjudged and decreed by the court that D. N. Fink, receiver in said cause appointed, be discharged upon the payment by him of the aforesaid balance to the plaintiff in the cause.

"To each and all of the findings above and to the decree of the court and each portion thereof, the defendant, Oklahoma Trust Company, excepted, and in open court prayed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit; and the court granted said prayer and allowed said appeal and, upon motion of said defendant, fixed its bond as follows: If said defendant shall desire to supersede this decree against it there shall be filed a bond properly conditioned in the sum of \$110,000.00, which, upon its approval, shall operate as a stay and supersedeas of this decree as to said defendant pending such appeal. If said defendant shall determine not to supersede then its cost bond shall be in the sum of \$1,000.00.

(Signed) RALPH E. CAMPBELL, *Judge.*"

Which said decree remains in full force and effect and has never been vacated or annulled in whole or in part; and, though often requested, the defendants have failed and refused to comply with any of the provisions thereof, and by reason of the insolvency of said Oklahoma Trust Company, said The McNerney Company, and the other parties therein mentioned, it is impossible to collect the amounts specified in said decree, or to enforce the same against said defendants.

Wherefore, your orator prays as he has heretofore prayed in his original bill of complaint.

And may it please your Honors to make an order requiring the defendants herein at a certain time and under a certain penalty therein to be limited personally to appear before this honorable court and answer this supplemental bill of complaint, except that answer need not be made under oath, answer under oath being expressly waived.

And may it please your Honors to grant unto your orator a writ or writs of subpoena directed to said Union State Bank, thereby commanding it at a certain time and under certain penalty therein to be limited personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, including answer to said original bill of complaint and the amendments thereof as well as this supplemental bill of complaint, except answer need not be made under oath, answer under oath being expressly waived, and to stand, perform and abide by such order, direction, and decree as may be rendered against it in the premises, as shall seem meet and agreeable in equity.

And your orator will ever pray.

F. B. DILLARD,  
A. L. BEATY,  
*Solicitors for Plaintiff.*

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

And, to-wit, on the 11th day of January, A. D. 1912, by order of the counsel for the complainant, Decrees *Pro Confesso* were, by the Clerk, entered in the Order Book of this Court, against The McNerney Company, P. J. McNerney, Oklahoma Trust Company and Alamo State Bank, which Decrees *pro Confesso* are in words and figures as follows:

**Order pro Confesso.**

Now comes the complainant herein, by A. L. Beaty, solicitor; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant, The McNerney Company, and P. J. McNerney.

R. P. HARRISON, *Clerk.*

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

**Order pro Confesso.**

Now comes the complainant herein, by A. L. Beaty, solicitor; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant, Oklahoma Trust Company.

R. P. HARRISON, *Clerk.*

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

**Order pro Confesso.**

Now comes the complainant herein, by A. L. Beaty, solicitor; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant, Alamo State Bank.

R. P. HARRISON, *Clerk.*

Endorsed: Filed Jan. 11, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

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And, to-wit, on the 6th day of February, A. D. 1912, by order of the counsel for the complainant, Decree *Pro Confesso* was, by the Clerk, entered in the Order Book of this Court, against the Union State Bank, which decree is in words and figures as follows:

**Order pro Confesso.**

Now comes the complainant herein, by A. L. Beaty, solicitor; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant, Union State Bank.

R. P. HARRISON, *Clerk.*

Endorsed: Filed Feb. 6, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

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And, to-wit, on the 19th day of February, A. D. 1912, the following Order was entered in this cause:

**Order Setting Aside pro Confesso Order As to Union State Bank.**

Now on this the 19th day of February, 1912, upon motion of the defendant, Union State Bank, for an order setting aside the Order *Pro Confesso* heretofore had in this cause and to file its answers therewith tendered, it is ordered that the Order *Pro Confesso* entered against the Union State Bank on the 6th day of February, be and the same is hereby set aside, and it is further ordered that the answers of the Union State Bank tendered with the aforesaid motion be filed instantler.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Feb. 19, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

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And, to-wit, on the 19th day of February, A. D. 1912, the defendant, Union State Bank, filed Answer to the Original

and Supplemental Bills of Complaint, and also filed Separate Answer to the Amended Bill of Complaint, which Answers are in words and figures as follows:

**Answer of the Union State Bank to the Original and Supplemental Bills of Complaint.**

Now comes the Union State Bank, and for its answer to the Bill of Complaint and to the Supplemental Bill of Complaint filed herein, admits:

First. The filing of the original Bill of Complaint, as alleged; and admits the rendition of the decree of September 5, 1911, In Equity, Cause No. 1239, entitled, W. S. Farish vs. P. J. McNERNEY et al.

But this defendant denies that it ever employed W. A. Ledbetter or C. B. Stuart to appear and defend the cause of action set up by the plaintiff in said cause No. 1239; and alleges that if the said W. A. Ledbetter and C. B. Stuart ever appeared in said cause, such appearance was wholly without its procurement or consent, and that neither of them ever had authority from this defendant to appear and bind it by any agreement, contention or concession; and,

This defendant further alleges that the said W. A. Ledbetter and C. B. Stuart never attempted to bind this defendant by any course of action, or any act of theirs, in said cause No. 1239, and that this defendant is in no way bound by said decree or any part thereof, or by any judication therein made and rendered.

*Second.* Further answering herein the said Union State Bank hereby adopts in full the answer of its co-defendant, the Banking Board of the State of Oklahoma, and hereby alleges that each and all of the allegations therein contained are true, and makes said answer the answer of this defendant to the same extent as though the same were reproduced and set out in full.

*Third.* Further answering herein, this defendant denies that it ever covenanted with the plaintiff, in writing, to be bound by the decision of the Court in this action, except in respect to a certain cash fund amounting to Eighteen Thousand Eighteen and 58/100 (\$18,018.58), alleged to have been transferred from the Union State Bank. And with respect to said cash fund this defendant has fully answered in its answer to the amended bill of complaint herein.

And now having fully answered herein, this defendant, the said Union State Bank, prays that it be dismissed with its costs.

C. N. HASKELL and  
LEDBETTER, STUART & BELL,  
*Attorneys for Defendants.*

Endorsed: Filed Feb. 19, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

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**Answer of the Union State Bank to the Amended Bill of  
Complaint.**

Now comes the Union State Bank, and for its answer to the amended bill of complaint herein, admits that it claims to have purchased certain bonds, notes, money and assets, referred to in said amended bill of complaint, and admits that said purchase was made from the Bank Commissioner of the State of Oklahoma, on or about the 25th day of August, 1910; and this defendant admits that it took possession of said property on or about said date. But with respect to the purchase of said property, this defendant alleges that on or about said day and date the Alamo State Bank, theretofore engaged in business at Muskogee, in the State of Oklahoma, became insolvent, and was taken into the custody, control and possession of the Honorable E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and that on said day and date the Bank Commissioner, by virtue of his office, took charge and possession of all of the assets, consisting of notes, bonds, warrants and other securities, and about the sum of Eighteen Thousand Eighteen and 58/100 Dollars (\$18,018.58) in cash. That on said day and date the said Bank Commissioner of the State of Oklahoma filed in the District Court of Muskogee County an application for permission and an order to sell all of said property; and on said day and date said District Court of Muskogee County did by its order, judgment and decree authorize and empower the said Bank Commissioner to sell, transfer and deliver unto the said Union State Bank all of the assets of every kind and character of the said Alamo State Bank, including said cash fund; and that on said day and date, pursuant to said order, judgment and decree of the District Court of Muskogee County, the said Bank Commissioner did transfer, sell and deliver unto this defendant said property, consisting, as aforesaid, of notes, securities and cash. A list of said notes, securities and property will be hereto attached, marked "Exhibit A", and made a part hereof. That this defendant then and there, in consideration of the transfer of said property agreed and bound itself to pay

each and all of the persons, firms and corporations to whom the said Alamo State Bank was indebted as depositors. The deposits thus agreed to be paid by this defendant amounting to about the sum of \$325,994.99.

And so this defendant alleges and charges that it purchased in good faith, for a valuable consideration, and without notice of any claim or lien on the part of the plaintiff herein, or his assignor, the Texas Company, of said assets, and that by reason of said purchase, this defendant became the owner and holder of all of said assets, free and discharged of any and all liens or claims held by the plaintiff herein, or by his predecessor, said Texas Company;

Wherefore, this defendant prays that it be dismissed with its costs, and that it have all other relief to which it may be entitled.

C. N. HASKELL and  
LEDBETTER, STUART & BELL,  
*Attorneys for Defendants.*

Endorsed: Filed Feb. 19, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

And, to-wit, on the 19th day of February, A. D. 1912, the complainant filed Replication to the Answers of the Defendants herein, which Replication is in words and figures as follows:

**Replication.**

*To the Honorable, the Judges of the District Court of the United States for the Eastern District of Oklahoma:*

Now comes W. S. Farish, the plaintiff in said cause, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of the defendants, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill of complaint, as amended and supplemented, to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or things in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to



aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill, as amended and supplemented, he hath already prayed.

F. B. DILLARD,

A. L. BEATY,

*Solicitors for Plaintiff.*

Endorsed: Filed Feb. 19, 1912, R. P. Harrison, Clerk  
U. S. District Court, Eastern District Oklahoma.

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And, thereafterwards, to-wit, the parties hereto filed Statement of Facts, which was approved by the Court. Said Statement of Facts is in words and figures as follows:

#### **Statement of Facts.**

*Be It Remembered*, That the following evidence, and no other evidence, was introduced on the trial of said cause:

Complainant introduced in evidence his original bill of complaint in equity cause 1239, lately pending in this court, filed on the 18th day of December, 1909, which was as follows:

"W. S. Farish, a citizen of the State of Texas, brings this his bill against P. J. McNerney, J. H. Huckleberry, J. B. Jones, Thos. H. Owen, Chas. H. Shaw, The McNerney Company, a private corporation, the Oklahoma Trust Company, a private corporation, and the City of Muskogee, Oklahoma, a municipal corporation, of which A. F. McGarr is mayor, all citizens of the State of Oklahoma, and all residing or domiciled therein, at Muskogee, except Thos. H. Owen, who resides at Guthrie, and Chas. H. Shaw, who resides at Lawton, Oklahoma, in the Western District.

"And thereupon your orator complains and says:

"I.

"That heretofore on or about the 22nd day of July, 1908, a contract was made and entered into by and between The Texas Company, a corporation and citizen of the State of Texas, and the defendant, P. J. McNerney, whereby the former, which was engaged in the manufacture and sale of asphalt and other products of petroleum, agreed to sell to the latter, who was a paving contractor, under a certain limited warranty, and to ship him, such quantity of Texaco Asphalt Paving Cement, when made at its Port Neches plant and as ordered by him, as would meet the requirements of his street paving contracts in the State of Oklahoma for three years



from said date, but not to exceed 4,000 tons annually, except by mutual agreement, and, as soon as he should have as much as 50,000 square yards of paving under contract, to furnish him, for his use, a paving outfit, consisting of a portable railroad plant and two suitable road-rollers, and said defendant agreed to pay said company \$28 per ton for the asphalt, f. o. b. Oklahoma City (or other points taking the same freight rate, including Muskogee), and to make payment for each month's shipments on or before the 5th day of the next month, and to cause such payment to be guaranteed in advance to said company's satisfaction, and to pay it, as rental, 10 per cent annually on the cost of the paving outfit, and, to cover depreciation on plant, 5 cents for each square yard of pavement laid, and to keep the equipment furnished in good repair and fully insured for said company's benefit against loss or damage by fire, lodging the policies with it, and to deposit, as a maintenance fund, with the defendant, the Oklahoma Trust Company, 5 cents for each yard of pavement laid; that it was therein and thereby further agreed that for said period of three years said McNerney should have the option of purchasing said equipment at its cost, receiving credit for any amounts paid by him on account of depreciation as stated; that it was therein and thereby yet further agreed that a failure of either party to keep any of the covenants hereinbefore mentioned would authorize the other to cancel the contract, as would also the failure of said McNerney, during any current year, to take as much as 2,000 tons of asphalt, authorize The Texas Company to cancel the same; and that said contract, which was verbal, was duly confirmed by the representative of said company in a letter of the date first mentioned, which letter was duly received by said defendant and no objection was made to said terms and conditions, and said company thenceforth acted upon the faith of the contract as stated in said letter and as here alleged.

## "II.

"That thereafter in the latter part of the year, 1908, said McNerney secured paving contracts in the City of Muskogee, Oklahoma, as follows, to-wit: For the paving and otherwise improving of, (1) Elgin Avenue from the east line of Eighth Street to the east line of Fourteenth Street, known as Paving District Number 17; (2) East Okmulgee Avenue from the east line of Cherokee Street to the east line of P Street, known as Paving District Number 25; (3) Thirteenth Street from the south line of Fon du Lac Street to the north line of Boston Avenue, known as Paving District Number 26; (4) Fourteenth Street from the south line of Elgin Avenue to the south line of Emporia Street, known as Paving District Num-

ber 27; (5) C Street from the north line of Callahan to the north line of Lawrence Street, known as Paving District Number 29; (6) Kendall Boulevard from the north line of Elgin Avenue to the south line of West Broadway Street, known as Paving District Number 33, and (7) Boston Avenue from the west line of Sixth to the east line of Seventeenth Street, known as Paving District Number 35; and that thereupon, and for the purpose of doing the work assumed under said contracts, the defendants, P. J. McNerney, J. H. Huckleberry, J. B. Jones, Thos. H. Owen and Chas. H. Shaw, organized, and caused to be incorporated under the laws of Oklahoma, said defendant, The McNerney Company, a corporation with charter power to do said things, and caused it to take over and assume said contracts, with resulting benefits and burdens, including the contract with The Texas Company, all of these having been entered into originally for the benefit of said McNerney and his said associates who thus formed the corporation and for the corporation and for the corporation that was to be formed.

### “III.

“That The Texas Company thereupon furnished the paving outfit as it had agreed to do and said defendants started the work under said contracts, ordering large quantities of material and supplies and contracting an indebtedness of about \$40,000 to the defendant, the Oklahoma Trust Company, and securing it with some kind of a pledge of or lien on the bonds or money to be obtained; that they ordered of The Texas Company a quantity of asphalt to be used in the work, but failed to tender the guaranty provided for in the aforesaid contract, whereupon shipment was declined, except with bill of lading attached to draft, until such guaranty should be furnished or satisfactory arrangement should be made; that said Oklahoma Trust Company was anxious for the work to proceed, in order that it might finally realize on its said security, but was not allowed under the law to advance more than it had already advanced, and cessation and abandonment of said work seemed imminent; that said McNerney importuned The Texas Company to come to the rescue and aid in the completion of said work and the performance of said contracts, which the latter finally agreed to do, and on or about the date written therein The Texas Company and the defendants whose names appear as signers thereof made and entered into written contracts in words and figures in substance as follows: (Here followed copy of contract which appears as Exhibit A to the bill of complaint in the present suit.)

## "IV.

"That thereafter the work on the aforesaid streets and districts proceeded, and while the same was in progress said McNerney and The McNerney Company, being assured by The Texas Company that it would extend the existing arrangement thereto, procured other additional paving contracts in said City of Muskogee as follows, to-wit: For the paving and otherwise improving of, (8) the unpaved portions of Lawrence Street from the east line of East Side Boulevard to the city limits, known as Paving District Number 15A; (9) Lawrence Street from east line of East Side Boulevard to east line of C Street, known as Paving District Number 15B; (10) Denver Avenue from west line of Eleventh Street to east line of Fourteenth Street and Thirteenth Street from north line of Elgin Avenue to south line of Boston Avenue, known as Paving District Number 45; (11) G Street from north line of Dayton to south line of Houston Street, known as Paving District Number 64; and (12) Fifteenth Street from north line of Okmulgee Avenue to south line of Fon du Lac Street, known as Paving District Number 66; that the first mentioned of these four last contracts was taken in the name of said McNerney and the others in the name of The McNerney Company, but they were all for the use and benefit of The McNerney Company; and that on or about the date written in the instruments copied below the parties whose names appear as signers thereof made and entered into further written contracts in words and figures in substance as follows: (Here followed copy of contract which appears as Exhibit B to the bill of complaint in the present suit.)

## "V.

"That under the contracts hereinbefore set out, in the year 1909 and on or about the days stated below, The Texas Company advanced to said McNerney and The McNerney Company various sums of money, and furnished the services of a superintendent and an accountant, and delivered shipments of asphalt, as follows: (Here followed itemized statement of the account.)

"And said defendants have had and still have the use of said paving equipment and have laid therewith a large amount of pavement, aggregating probably 100,000 square yards, and are still so engaged, but your orator is unable to state the yardage with certainty and exactness.

## "VI.

"That under and by virtue of said paving contracts in the City of Muskogee, which contracts were with said city and

were in accordance with the statutes of the State of Oklahoma, made and provided in such cases, the contractor was to be paid in bonds issued against the land in and on said paving districts, which bonds bear interest from their dates at the rate of six per cent per annum and are payable in from one to ten years, as provided by said statutes, and that the necessary proceedings have been taken and bonds have been issued for certain of said paving districts, and in part have been delivered to said Oklahoma Trust Company, which in turn has sold certain of the same, as follows:

“District 17.—On or about the 17th day of August, 1909, said city issued bonds, dated the 16th day of June, 1909, aggregating \$20,166.69, and delivered all of them to said Oklahoma Trust Company, except four for \$1,000 each, which remain in the possession of said city.

“District 25.—On or about the 13th day of December, 1909, said city issued bonds, dated the 11th day of November, 1909, aggregating \$57,191.89, and delivered all of them to said Oklahoma Trust Company, except one for \$211.89, eight for \$220 each, nine for \$500 each, and six for \$1000 each, which remain in the possession of said city.

“District 26.—On or about the 24th day of November, 1909, said city issued bonds, dated the 21st day of July, 1909, aggregating \$22,590.96, and delivered all of them to said Oklahoma Trust Company, except four for \$250 each and seven for \$1,000 each, which remain in the possession of said city.

“District 27.—On or about the 24th day of November, 1909, said city issued bonds, dated the 23rd day of July, 1909, aggregating \$31,304.10, and then and later delivered all of them—a bond for \$1,000 being delivered on the 13th day of December, 1909—to said Oklahoma Trust Company, except one for \$130 and six for \$1,000 each, which remain in the possession of said city.

“District 29.—On or about the 17th day of August, 1909, said city issued bonds, dated the 16th day of June, 1909, aggregating \$29,730.43, and delivered all of them to said Oklahoma Trust Company, except one for \$720.43 and five for \$1,000 each, which remain in the possession of said city.

“District 33.—On or about the 13th day of December, 1909, said city issued bonds, dated the 16th day of August, 1909, aggregating \$23,301.87, and delivered all of them to said Oklahoma Trust Company.

“District 64.—On or about the 13th day of December, 1909, said city issued bonds, dated the 15th day of Septem-

ber, 1909, aggregating \$11,782.30, and delivered all of them to said Oklahoma Trust Company, except four for \$175 each and one for \$1,000, which remain in the possession of said city.

"All bonds bear interest from date and interest is not included in the aggregates given, but is in addition thereto.

#### "VII.

"That said Oklahoma Trust Company has negotiated and sold said bonds which it received on said districts 17, 26, 27 and 29, at and for a price exceeding said contract price, but has not accounted for the value, price or proceeds thereof, except that it did on or about the 25th day of September, 1909, pay over to The Texas Company the sum of \$27,906.57, which was part of the proceeds of bonds on said districts 17 and 29; that said defendant has refused to pay over the balance of the proceeds or of the agreed price of said bonds on districts 17 and 29 or to pay over any part of the proceeds or of the agreed price of said bonds on districts 26 and 27; but that said defendant is intending to sell and probably has sold said bonds delivered to it on the 13th day of December, 1909, on districts 25, 27, 33 and 64, but has hardly had sufficient time to receive the proceeds and commingle and confuse the same with its other funds; that said defendant proposes and intends to continue receiving and selling future bonds under said contracts and, if permitted to do so, will doubtless receive and retain the proceeds thereof and commingle and confuse the same with its other funds; that the only excuse given for this course of conduct is that said McNerney, who is asserting some kind of a claim or defense against The Texas Company, has forbidden it to pay over the money, and yet it may intend to assert a priority; and that, while ordinarily your orator could protect himself by taking the bonds directly from said city under the power and appointment aforesaid, such remedy is not open here because said McNerney Company have repudiated their said agreements and have been trying to induce the officers of said city to deliver bonds to them, all of which, as your orator verily believes, would cause the officers of said city to be unwilling to make delivery of future bonds to your orator.

#### "VIII.

"That The McNerney Company is insolvent and said individual obligors are persons of comparatively small means and would not be able to respond for the unpaid amount of their said indebtedness if said bonds and the proceeds thereof should be dissipated; that said Oklahoma Trust Company is engaged in a general banking business, and, while probably

not insolvent, is not considered by your orator, and, as he believes and charges, would not be considered by depositors and customers generally, a safe depository for so large a sum of money, especially when it may be doubtful whether the relation of bank and depositor applies so as to give your orator the protection due a depositor under the laws of Oklahoma; that request has been made by your orator's solicitor that the funds accruing from said bonds be placed on deposit in a special account with some unquestionably solvent bank to be agreed upon, but said request was ignored by said defendant; and that unless this court shall interfere said defendant will soon hold a very large sum of money to which your orator is entitled, which holding would be in violation of contract and without adequate security or protection to your orator.

"IX.

"Your orator further shows that heretofore on the 9th day of December, 1909, The Texas Company, by a proper instrument of writing, duly executed by it and delivered to your orator, did transfer, assign and set over unto your orator all its claims and causes of action, growing out of the transaction herein alleged, against said P. J. McNerney, The McNerney Company, J. H. Huckleberry, J. B. Jones, Thos. H. Owen, Chas. H. Shaw and The Oklahoma Trust Company or any or either of them, and your orator is now the legal holder thereof, subject to any credits, offsets or counter claims that may exist.

"X.

"Your orator further shows that there were mutual debits and credits between The Texas Company and the defendants and that said defendants are entitled to credits in addition to those hereinbefore admitted amounting probably to \$20,000; that the accounts are complicated and neither your orator nor his said assignor is able to determine what items or amounts were advanced for and on account of each particular district or to separate the items and amounts in the two contracts, namely, the contract of the 5th day of January, 1909, and the contract of the 14th day of June, 1909; that the accountant furnished by The Texas Company kept books and records from which this information was obtainable, but necessary parts of said records were recently taken from him by said McNerney by duress and coercion and through threats of bodily harm and were turned over to said Oklahoma Trust Company; that the defendants (those who are the principal obligors as aforesaid) have elected to claim and are claiming credits and offsets to be credited, by reason of a contention on their part that the superintendent



furnished by The Texas Company caused to be expended too much money in said work and by reason of the further contention on their part that said company wrongfully terminated its contract of the 22nd day of July, 1908, but that, as your orator is informed and believes and therefore avers, said claims and contentions are without merit; and that your orator, through his duly authorized representative, has demanded of said defendants an account, but the same has not been furnished, and it will not be furnished in fair and intelligible form.

#### “XI.

“Your orator further avers that with the money furnished by The Texas Company as aforesaid the defendants have almost completed all of said paving contracts; that they are now engaged in the final completion thereof and it is highly desirable that this shall continue; that since getting the proceeds of said bonds on districts 26 and 27 said Oklahoma Trust Company has been able and willing, as your orator is informed and believes, to advance the money necessary for said purpose, and is now doing so; that the full and final completion of said work is necessary before the last of the bonds can be obtained and is therefore an essential to your orator's complete security; that as long as said defendants proceed with said work in a faithful manner it is best for all concerned that they be allowed to do so; that it is furthermore necessary that at proper times estimates, appraisements, ordinances, resolutions, bonds and other documents be drawn and submitted to mayor and councilmen of said city and that the legal sufficiency and technical regularity of all proceedings be looked after, but said defendants have counsel well skilled in such matters, and, so long as harmonious action can be had, it is desirable that such counsel continue to act in said matters; that your orator has no desire or purpose to prevent or stay any act of the defendants looking to the faithful completion of said contracts, the obtaining of the bonds, the sale thereof, or the proper application of the proceeds; that the money which said Oklahoma Trust Company has for the sale of bonds on districts 17, 26, 27 and 29, and which, as your orator is informed and believes and therefore avers, it has commingled and confused with its other funds, is, as your orator is informed and believes and therefore avers, more than sufficient to fully and finally complete said contracts, and he is willing that, if necessary, so much thereof as shall be needed may be used for that purpose, provided the defendants in so doing shall be subject to the jurisdiction, and, if need be, to the control, of the court in this cause.

## "XII.

"Your orator further states that The McNerney Company has in its possession a few tangibles, such as asphalt wagons, paving tools, office furniture and fixtures, adding machines, and a few other articles of personal property, which were bought with said money advanced by The Texas Company and were necessary in the prosecution of said work and were in effect bought by The Texas Company for the purposes of said contracts; that inasmuch as The McNerney Company is insolvent its officers and directors are trustees for its creditors and your orator has a lien or quasi lien on all of said assets for the payment of its debt; and that since the acquisition of this property and its present ownership were and are parts of the transactions involved in this cause, and said tangibles are needed for the completion of said work, your orator is entitled to an order preventing the sale or disposition thereof until said work is completed and this court shall make a release.

"In consideration whereof, and forasmuch as your orator is remediless, except in a court of equity, he sues and prays:

"1. That your Honors immediately take jurisdiction of all the matters and things hereinbefore alleged and presented and over all the parties to this bill.

"2. That you at once grant your writ of injunction, (1) enjoining and restraining said Oklahoma Trust Company from commingling or confusing the funds derived from said bonds on said paving districts 25, 33 and 64 and the \$1,000 bond on district 27, or from any future bonds received by it on any district, with any other funds, and peremptorily commanding and requiring it to keep such proceeds separate and apart, so that no creditor of said Oklahoma Trust Company, other than your orator and others interested in said bonds, will have any claim thereon, unless and until it shall furnish adequate and proper security to be approved by the court, (2) enjoining and restraining said city from delivering any bonds issued on any of said twelve districts to P. J. McNerney, or The McNerney Company, or to any one, except your orator and said Oklahoma Trust Company and any master or Commissioner or receiver that may be appointed by the court, and (3) enjoining and restraining said McNerney and The McNerney Company from selling or otherwise disposing of any of said articles of personal property called tangibles, or any of said bonds, until the further order of the court.

"3. That said McNerney and The McNerney Company be required and compelled to present for adjudication any

credits, offsets or counter-claims which they or either of them may have; also to make discovery and show what part of said indebtedness to your orator is chargeable under said contract of the 5th day of January, 1909, and what part under said contract of the 14th day of June, 1909; and that an account be taken of what is due your orator under each of said contracts.

"4. That all persons have [having] claims on or against any of said bonds on said twelve paving districts or any or either of them, or against the proceeds thereof, be required and compelled to intervene herein, to the end that such claims may be determined, and under penalty of being barred.

"5. That all of the aforesaid bonds heretofore issued or hereafter to be issued and the proceeds thereof, when sold, be decreed to constitute a trust fund and all persons dealing with the same trustees, and that the same be decreed subject to the payment of your orator's claim and that payment be enforced accordingly.

"6. That your orator have judgment against the parties liable for any part of its claim that may remain unpaid.

"7. Your orator prays for such other and further relief as may be adapted to the nature of his case and as may seem meet and proper in equity and good conscience.

"And may it please your Honors to grant unto your orator a writ or writs of subpoena directed to said defendants hereinbefore named, thereby commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, except that answer need not be made under oath, answer under oath being waived, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable in equity.

"And your orator will ever pray."

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Complainant introduced in evidence restraining order of this court, made in said equity cause 1239, which was as follows:

"On this the 18th day of December, 1909, came on to be heard the plaintiff's application for an injunction, and upon consideration of the Bill of Complaint, the court takes jurisdiction of the matters and things therein alleged and presented, and over all the parties thereto. And it is the order

of the court that until further order shall be made or this order shall expire as hereinafter provided, the defendant Oklahoma Trust Company is enjoined and restrained from commingling or confusing the funds derived from the paving bonds delivered to it by the City of Muskogee on or about the 13th day of December, 1909, the same being bonds on districts 25, 33 and 64, and one bond on district 27, and from commingling and confusing funds derived from any future bonds received by it under any paving contracts of P. J. McNerney or the McNerney Company, with any other funds, and said Oklahoma Trust Company is peremptorily commanded and required to keep all such proceeds separate and apart so that no creditor of said Oklahoma Trust Company, other than the plaintiff and others interested in said bonds, will have any claim thereon, provided that said Oklahoma Trust Company, upon furnishing adequate and proper security to be approved by the court, may be relieved of this order; and it is further ordered that the City of Muskogee be enjoined and restrained from delivering any bonds issued on Paving Districts 15A, 15B, 17, 25, 26, 27, 29, 33, 35, 45, 64 and 66, or any or either of them to P. J. McNerney or The McNerney Company, or to any one except the plaintiff herein, and said Oklahoma Trust Company and any master or commissioner or receiver that may be appointed by the court; and that said P. J. McNerney and The McNerney Company are enjoined and restrained from selling or otherwise disposing of any of said bonds or any of the asphalt wagons, paving tools or office furniture and fixtures purchased with funds purchased by The Texas Company.

"This order shall expire at midnight on the 25th day of December, 1909, unless the plaintiff shall at or before that time file herein a bond, with good and sufficient security, to be approved by the court, or in the absence of the judge, by the clerk of the court, in the sum of \$5000.00, conditioned that he will pay the defendants all such damages as may be sustained by them in case this order is wrongfully procured. The endorsement of such approval and the filing of such bond herein without further order or action by the court shall be sufficient to preserve and keep in force this order as now made.

"The defendants are required to appear before this court at Muskogee on the 10th day of January, 1910, at 10 o'clock, A. M., to show cause, if any they have, why this restraining order shall not be continued, and kept in force.

"Service hereof shall be made by the marshal or the other proper officer delivering to the defendants, who are restrained, and each of them, a true copy of this order."

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Complainant introduced in evidence return of the marshal, showing personal service of this restraining order on P. J. McNerney at 5:00 o'clock, P. M., December 18, 1909; and service on Oklahoma Trust Company, through its president, J. B. Jones, and on the City of Muskogee, through its mayor, A. F. McGarr, on the same date; also injunction bond, in compliance with the requirements of the restraining order, dated December 22, 1909, and filed and approved December 23, 1909.

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Complainant introduced in evidence his application for the appointment of a receiver, filed in said equity cause 1239, which was as follows:

"Now comes W. S. Farish, plaintiff in said cause, and respectfully shows that heretofore on the 18th day of December, 1909, he filed therein his bill of complaint against the defendants, P. J. McNerney, J. H. Huckleberry, J. B. Jones, Thomas H. Owen, Charles H. Shaw, The McNerney Company, Oklahoma Trust Company and the City of Muskogee; that he therein showed a certain contract entered into on or about the 22nd day of July, 1908, between The Texas Company and the defendant, P. J. McNerney and others, and that, subsequently thereto, said McNerney and defendant, The McNerney Company, procured certain street paving contracts in the City of Muskogee, embracing twelve certain paving districts; also that on or about the 5th day of January, 1909, and on or about the 14th day of June, 1909, said parties, including other defendants, entered into certain other contracts as were in said bill of complaint set forth at length; also that thereafter during the year 1909, under and by virtue of said contracts alleged, The Texas Company advanced various sums, amounts and items amounting to more than \$200,000.00, the larger portion of which remained unpaid; also that, under and by virtue of said contracts, The Texas Company was to receive certain paving bonds which were to be issued by the City of Muskogee in payment for said paving work, which bonds in turn were to be delivered to the Oklahoma Trust Company and by it accepted and paid for within five days after delivery, at ninety cents on the dollar; also that paving bonds aggregating \$192,058.24 had been issued by said city, and a portion thereof, to-wit: paving bonds amounting to \$154,035.92 had been delivered to said Oklahoma Trust Company, which had turned over only \$27,906.57 to The Texas Company, although a much greater time than five days had elapsed since its receipt of such bonds; also that

said Oklahoma Trust Company had negotiated a part or all of said bonds, and had refused to agree to keep the proceeds separate and apart from its other funds; also that The Texas Company had assigned and set over unto your orator all its claims and causes of action growing out of the transactions in said bill of complaint alleged; also that the accounts between the parties were complicated, and an accounting necessary; and further that, with money advanced by The Texas Company, defendant, The McNerney Company, had purchased certain articles of personal property for the express and distinct purposes of doing the work contemplated by said paving contracts. In addition to which there were in said bill of complaint many other and additional allegations which will more fully appear by an inspection thereof. And the plaintiff prayed, (1) that the court take jurisdiction of all matters and things alleged and presented; (2) that the defendant, Oklahoma Trust Company, be enjoined and restrained from commingling and confusing funds derived from said paving bonds with any other funds, and peremptorily commanding and requiring it to keep such proceeds separate and apart, and that said city be enjoined from delivering bonds issued on any of said twelve paving districts to P. J. McNerney or The McNerney Company, or to any one except the plaintiff and said Oklahoma Trust Company, or any master or receiver appointed by the court, and that said McNerney and The McNerney Company be enjoined and restrained from selling or otherwise disposing of said articles of personal property purchased with funds advanced by The Texas Company; (3) that said McNerney and The McNerney Company be required and compelled to present for adjudication any credits, offsets or counter-claims, which they or either of them might have, and to make discovery and show what part of the indebtedness referred to is chargeable under each of the two contracts mentioned, and that an account be taken under each of said contracts; (4) that all persons having claims on or against any of said bonds on said twelve paving districts or any or either of them, or against the proceeds thereof, be required and compelled to intervene herein, to the end that such claims may be determined; (5) that all of said bonds issued or to be issued, and the proceeds thereof, be decreed to constitute a trust fund, and all persons dealing with the same trustees, and the same to be decreed subject to the payment of the plaintiff's claim, and that payment be enforced accordingly; (6) that judgment be rendered against the parties liable for any part of the plaintiff's claim that may remain unpaid; and (7) for general relief.

"Your orator further shows that the court did on said date take jurisdiction of all matters and things alleged in



said bill of complaint, and did issue its writ of injunction in accordance with the prayer thereof, which injunction is now in full force and effect and has been duly served on the defendants, who have also been duly served with a writ of subpoena issued in said cause, and have entered their appearances therein.

"Your orator further avers, on information and belief, that the defendants, P. J. McNerney, The McNerney Company, Oklahoma Trust Company and the individual defendants who were parties to said contracts, have ceased to carry on the paving work under said contracts and are not now prosecuting the same; that they, or those having control, have diverted the asphalt wagons and certain tools and appliances from said work, using the same for other purposes; that the contracts with said city provide for penalties if the work is not completed in specified time and such penalties will accrue and attach if said work is not continuously prosecuted with diligence; and that if said matters are allowed to remain in the hands of the defendants, your orator will suffer great loss and damage, for which he has no adequate remedy at law.

"Your orator further shows that said Oklahoma Trust Company has received large sums of money from the sale of paving bonds heretofore delivered to it, and, as your orator is informed and believes and therefore avers, now has in its possession or under its control much more than \$100,000.00 to which your orator is entitled and which it withholds from him without any just or valid excuse; that, since the order of this court made on the 18th day of December, 1909, said Oklahoma Trust Company has changed its methods of business, and has announced a cessation of the banking business, pretending to have sold its business of receiving deposits and other banking business to another concern, thus rendering doubtful the application of the order of court, provided it has transferred said funds to its purchaser; and that, although your orator has made upon it repeated requests for information showing the amounts received for said paving bonds, date of receipt and name and place of each depository thereof, said defendant has positively refused to furnish such information, or to disclose any of the facts in that connection. And your orator now submits that said defendant thus renders nugatory and ineffectual the order of court and evades the true spirit thereof.

"Wherefore your orator prays that a receiver be appointed with power, authority and directions, (1) to receive and hold, subject to the orders of the court, all unsold paving bonds and the proceeds of all paving bonds sold, on said twelve paving districts and each of them, as mentioned and

described in said bill of complaint; (2) to take into his possession and use all wagons, machinery, implements, tools, fixtures and other personal property purchased with funds furnished by The Texas Company and now in the possession of the defendants or either of them; (3) to complete all unfinished work under the aforesaid contracts with the City of Muskogee; and (4) to do such other and further things and perform such duties as may be prescribed by the court pending the adjudication and settlement of the matters involved in this suit. And your orator prays that all parties having any of said bonds, or funds representing the proceeds of bonds, be peremptorily required to deliver the same to said receiver. And that all parties whomsoever be enjoined and restrained from in any manner interfering with the possession of such receiver, in respect to any property coming into his hands or to which he may be entitled. And your orator prays as in his bill of complaint he has prayed."

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Complainant introduced in evidence amendment to his bill of complaint in said equity cause 1239, which was as follows:

"Now comes the plaintiff and, with leave of the court first obtained, brings this his amendment of his original bill of complaint against the defendants herein.

"And thereupon your orator complains and makes amendment as follows:

"First: In paragraph VI, after the word 'same' and preceding the words 'as follows,' make a semicolon of the comma and insert the following:

" 'That on or about the 29th day of June, 1909, The Texas Company notified the City of Muskogee of its rights in the premises by causing to be delivered to the mayor of said city a written notice in the form of a letter signed by its representative as follows:

" 'This is to advise that The Texas Company holds a transfer and assignment of all bonds to be issued in favor of Peter J. McNerney or The McNerney Company under street paving contracts now in force in your city, with power of attorney to receipt for same, and will expect delivery to be made in accordance with these instruments when time for delivery arrives,'

and thereafter, at the suggestion of the mayor, left with him copies of said written contracts; that the mayor and the city subsequently refused to deliver bonds to P. J. McNerney, The McNerney Company and, though taking

McNerney's receipt, made actual delivery to said Oklahoma Trust Company under said assignments; and that the bonds so issued and delivered by said city prior to the filing of the bill of complaint were'

"Second: At the end of paragraph VIII add the following:

"Furthermore said defendant has assumed and now maintains an attitude of hostility towards your orator and has conspired with other defendants to deprive your orator of his money.' After receiving, on or about the 13th day of December, 1909, the bonds hereinbefore mentioned, it has pretended to shift the possession thereof to others unknown to your orator and to place the same beyond the jurisdiction of the state courts and will probably deny in its answer that it received such bonds. Said defendant also refuses to give any information as to what has become of said bonds or their proceeds and persists in secreting or concealing the same. And in addition to The McNerney Company said McNerney is also insolvent.'

"Third: In lieu of paragraph IX, as it appears in said original bill of complaint, insert, and, by amendment, substitute the following:

"Your orator further shows that prior to the 9th day of December, 1909, The Texas Company had fully complied with all of its undertakings and obligations to the defendants under said contracts, so that nothing remained to be done by it; that besides furnishing the paving plant and steam rollers it had delivered to P. J. McNerney and The McNerney Company at Muskogee the full amount of asphalt necessary to complete all of the paving work mentioned in said contracts and had advanced all funds that it considered expedient or that could reasonably be considered expedient for the completion of said paving contracts and the payment of bills incurred and had fully elected to furnish no further funds; and that thereupon on the day and year last mentioned, The Texas Company, made, executed and delivered to the plaintiff an instrument of writing in words and figures in substance as follows: (Here followed copy of assignment which appears as Exhibit C to the bill of complaint in the present suit.)

—whereby it was intended to transfer, assign and set over unto your orator all claims and causes of action which The Texas Company then had against the defendants mentioned in said instrument, whether such claims were then due or were to become due in the future,

growing out of said contracts and acts performed by The Texas Company, including the transactions herein mentioned and all monies to accrue by reason thereof.'

"Fourth: At the end of paragraph XII add the following:

" 'And your orator further shows that The McNerney Company owns and has on hand considerable quantities of stone, sand, cement, asphalt and other paving material, some of which is at the plant in said city and some on or near the streets ready for use, all of which is, as every other particle of material that has gone into said paving work since the 5th day of January, 1909, was, subject to the lien of said contracts; but your orator is unable to state the quantity or the exact location of said materials.'

" 'And by reason of the facts alleged, your orator has an equitable lien and also a contract lien on all bonds issued or to be issued in payment for said work and on the proceeds of all such bonds, and that, because it was agreed as aforesaid by said Oklahoma Trust Company that it would simultaneously accept and pay for bonds delivered to it within five days after their tender—a cash transaction—and because of the conduct of said defendant in taking bonds and omitting to pay for the same, your orator is entitled to the aid of the court in following and subjecting the proceeds of all bonds delivered to said defendant and in preventing the delivery to it of future bonds, except when they are paid for upon delivery as provided in said contracts, and also to other relief mentioned in the prayer.'

"Wherefore, your orator prays, as he has heretofore prayed in his original bill of complaint; also that the defendant, Oklahoma Trust Company, be enjoined from hereafter receiving any bonds except upon paying the contract price therefor when and as the same are received; and that said defendants may answer, but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the matters stated and charged in said original bill of complaint and those hereinbefore stated and charged in this amendment thereto."

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Complainant introduced in evidence order appointing receiver in said equity cause 1239, which was as follows:

"On this the 16th day of February, 1910, the court resumed the hearing of the plaintiff's petition for the appointment of a receiver in said cause, which hearing was com-

menced on the 28th day of January, 1910, after due notice to the defendants, who then filed no answer but relied on their demurrers; and the matter having been taken under advisement and after full argument at that time, and the plaintiff having since, under leave of the court, amended his bill of complaint, and the defendants having, under like leave, filed answers to said petition, and the hearing now being on the bill of complaint, as amended, the petition aforesaid, the demurrers and said answers of the defendants, together with the affidavits filed and the parole testimony of P. J. McNerney taken in open court on the issue of his insolvency and that of The McNerney Company, and the defendants having had due notice that the hearing would be resumed at this time, and, because it is the opinion of the court that a receiver should be appointed as hereinafter shown, it is ordered, adjudged and decreed by the court that D. N. Fink be and he is hereby appointed as the receiver of this court, to do and perform the following duties, to-wit:

“(1) To demand and receive from the defendant, Oklahoma Trust Company, and all other persons having the same or any portion thereof, the paving bonds issued by the City of Muskogee on its Paving Districts 25, 33 and 64, and one bond on district 27, which are more fully described in said bill of complaint and are therein alleged to have been delivered to said Oklahoma Trust Company on or about the 13th day of December, 1909, and which are likewise mentioned in the order of this court made on the 18th day of December, 1909;

“(2) To demand and receive from said Oklahoma Trust Company, and all other persons having the same or any portion thereof, the proceeds of said bonds, in case a sale of any bond or bonds has been made;

“(3) To receive from the City of Muskogee any and all bonds that may hereafter be delivered by said City in payment for work done under existing contracts of said city with P. J. McNerney and The McNerney Company, which contracts are fully set forth in the bill of complaint;

“(4) To sue for and recover any bonds or proceeds, and to hold or dispose of bonds received and to hold all proceeds of bonds and moneys collected subject to the further order of this court; and

“(5) To perform such other duties as hereafter may be ordered by this court under the bill of complaint or the petition herein.

"And said Oklahoma Trust Company and all other persons having said bonds which have been heretofore delivered by the city on districts 25, 33, 64 or said bond on district 27, or the proceeds of the same or any of them, are hereby directed, required and compelled to deliver the same forthwith to said receiver, and all persons are hereby enjoined and restrained from in any manner interfering with the possession of said receiver and from hindering, delaying or retarding him in the performance of his duties, and all persons, except said receiver, are hereby enjoined and restrained from receiving any paving bond or bonds from said city under said contracts of P. J. McNerney and The McNerney Company.

"It is further ordered that all persons having claims on or against any of the bonds or the proceeds of bonds for which said receiver is appointed shall be required and compelled to intervene herein within ninety days from this date, and the claim of any one failing to do so shall not be allowed, and that said receiver shall cause notice of this provision to be published in some Muskogee daily newspaper for thirty days, commencing within five days after he qualifies.

"The bond of said receiver is fixed at Fifty Thousand (\$50,000) Dollars, which he shall give for the faithful discharge of his duties, and conditioned that he will account for all property and pay over all money received, the same to be approved by the court, after the giving and approval of which and the filing of an oath that he will obey the orders of the court and faithfully discharge said duties to the best of his ability, said receiver shall proceed hereunder.

"W. M. Mellette is hereby appointed special master in said cause, and is authorized and directed to require the attendance before him of witnesses and the production of evidence touching the removal, sale, present location, and other matters in connection with, bonds heretofore delivered by said city, which will enable the receiver to reduce such bonds or their proceeds to possession, at which hearings the plaintiff's solicitors may appear and examine witnesses, and said special master shall report his findings to the court. He shall also hear and report on such other matters as may be referred to him later."

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Complainant introduced in evidence motion to extend receivership and against J. B. Jones for contempt filed in said equity cause 1239, which was as follows:

"Now comes the plaintiff, W. S. Farish, and shows to the court that the defendant, the Oklahoma Trust Company,



has violated the injunction granted herein on the 18th day of December, 1909, and has attempted to appropriate the proceeds of the greater portion of the bonds mentioned in said injunction proceedings to its own use and benefit; that said defendant has failed to keep the funds arising from said bonds separate and apart, as required by the order of this court; that the defendant J. B. Jones was the active mover and caused the violation of said injunction; and that said defendant is now in contempt of this court.

"Plaintiff further shows that said Oklahoma Trust Company has disposed of the greater portion of its property, is insolvent, and has left not enough to satisfy the plaintiff's claim and other claims against it; that because of its conduct in dealing with the bonds and proceeds of bonds as herein shown and as shown in the bill of complaint, as amended, and the petition for a receiver herein, the plaintiff has a lien upon the property now owned by said defendant; and that said defendant is about to make sale or dispose of its remaining property, and will probably do so on this very day unless prevented by the court; and that when it has so disposed of its property it will either distribute the proceeds to the stockholders who are scattered and numerous, or make some other disposition, whereby the plaintiff will be prevented from collecting its debt.

"Wherefore, the plaintiff prays that the order heretofore made appointing a receiver be extended and enlarged so that said receiver will immediately take charge of all property now owned by said Oklahoma Trust Company of whatsoever nature or description; that all persons having possession or control of the same or any portion thereof be required to deliver the same to said receiver; that all persons be enjoined from interfering with possession of said receiver or his administration of said property of the Oklahoma Trust Company for the benefit of the plaintiff and others having claims thereon, and that said J. B. Jones be dealt with for contempt of court and be required to restore the bonds or their proceeds which were not kept as required by the order of this court, or to pay over to the receiver an equivalent amount."

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Complainant introduced in evidence the order of the court on the foregoing motion in said equity cause 1239, which was as follows:

"It is ordered by the court on this the 19th day of February, 1910, that the defendant Oklahoma Trust Company and all persons whomsoever having possession or control of

the property and assets of said Oklahoma Trust Company or any portion thereof, be and they are hereby enjoined and restrained from making sale, transfer, encumbrance, or other disposition of said property and assets or any portion thereof, and from removing same or any portion thereof, and that the defendant J. B. Jones be required to appear in person before this court on Tuesday, the 22nd day of February, 1910, at two o'clock P. M., at Muskogee, to show cause if any he has, why he should not be dealt with for contempt.

"The injunction here granted shall remain in force until the further order of this court touching the same, and the marshal shall make service thereof by delivering copies of this order to the parties affected."

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Complainant introduced in evidence return of the marshal, showing service of the foregoing order on J. B. Jones, February 21, 1910; on Alamo State Bank, February 19, 1910; on Oklahoma Trust Company, February 25, 1910; and also injunction bond in compliance with the requirements of the order of February 19, 1910, filed and approved February 22, 1910.

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Complainant introduced in evidence a motion filed by him against Alamo State Bank, on August 6, 1910, in said equity cause 1239, which was as follows:

"Now comes W. S. Farish, plaintiff in said cause, and respectfully shows that heretofore on the 18th day of December, 1909, he filed herein his bill of complaint against the defendants, P. J. McNerney, J. H. Huckleberry, J. B. Jones, Thomas H. Owen, Charles H. Shaw, The McNerney Company, Oklahoma Trust Company and the City of Muskogee; that he therein showed a certain contract entered into on or about the 22nd day of July, 1908, between The Texas Company and the defendant, P. J. McNerney, and that subsequently said McNerney and defendant, The McNerney Company, procured certain street paving contracts in the City of Muskogee, embracing twelve certain paving districts; also that on or about the 5th day of January, 1909, and on or about the 14th day of June, 1909, said parties, including the other defendants, entered into certain other contracts as were in said bill of complaint set forth at length, wherein and whereby it was, among other things, stipulated and agreed that, for the purpose of securing the indebtedness, present and future, of said McNerney and The McNerney Company, defendants,

to said The Texas Company, there was pledged, assigned and set over to the latter all bonds to be issued for said work and all amounts owing or to become owing to the contractor on account of said contracts, and wherein and whereby it was expressly agreed by said Oklahoma Trust Company that any pledge or lien it had or might acquire should be subordinate to the rights of said The Texas Company; that it was therein further shown that subsequently during the year 1909, under and by virtue of said contracts alleged, The Texas Company advanced sums and items, amounting to more than \$200,000.00, of which more than \$180,000 remained and now remains unpaid; also that the paving bonds which were to be issued by the City of Muskogee in payment for said paving work were to be delivered to the Oklahoma Trust Company and by it were to be accepted and paid for within five days after delivery, at ninety cents on the dollar; also that paving bonds aggregating \$192,058.24 had been issued by said city, and a portion thereof, to-wit: paving bonds amounting to \$154,035.92 had been delivered to said Oklahoma Trust Company, which had turned over only \$27,906.57 to The Texas Company, although a much greater time than five days had elapsed since its receipt of such bonds; also that said Oklahoma Trust Company had negotiated a part or all of said paving bonds, and had refused to agree to keep the proceeds separate and apart from its other funds; and further that The Texas Company had assigned and set over unto your orator all its claim and causes of action growing out of the transactions in said bill of complaint alleged. In addition to which there were in said bill of complaint many other and additional allegations which will more fully appear by an inspection thereof. And the plaintiff prayed, among other things, in substance, (1) that the court take jurisdiction of all matters and things alleged and presented; (2) that the defendant, Oklahoma Trust Company, be enjoined and restrained from commingling and confusing funds derived from said paving bonds so issued on districts numbered 25, 33 and 64, and a bond for \$1000 on 27, with any other funds, and that it be peremptorily commanded and required to keep such proceeds separate and apart; (3) that all of said bonds issued or to be issued, and the proceeds thereof, be decreed to constitute a trust fund, and all persons dealing with the same trustees, and that the same be decreed subject to the payment of the plaintiff's claim, and that payment be enforced accordingly; (4) that judgment be rendered against the parties liable for any part of the plaintiff's claim that should remain unpaid; and (5) for general relief.

“Plaintiff further shows that the court did on said date take jurisdiction of all matters and things alleged in said bill

of complaint, and did issue its writ of injunction in accordance with the prayer thereof, which injunction was on the same date duly served on said Oklahoma Trust Company and is now in full force and effect, and the defendants have also been duly served with a writ of subpoena issued in said cause, and have entered their appearances therein; also that thereafter on the 16th day of February, 1910, on the plaintiff's petition, the court in said cause appointed D. N. Fink receiver and directed him to demand and receive from said Oklahoma Trust Company and all other persons having the same or any portion thereof, the proceeds of said paving bonds, if sold; whereupon said D. N. Fink duly qualified as receiver and is now acting as such; and by said order of this court not only said Oklahoma Trust Company was, but all other persons having the proceeds of said paving bonds were also required and compelled to deliver the same forthwith to said receiver.

"1. That on or about the 31st day of December, 1909, certain of the paving bonds mentioned and embraced in said injunction having been sold by the direction of said Oklahoma Trust Company, the proceeds thereof, to the extent of \$21,252.40, were deposited in and with the Hamilton National Bank of Chicago to the credit of said Oklahoma Trust Company.

"2. That thereafter on or about the 3rd day of January, 1910, in the City of Muskogee, said Oklahoma Trust Company sold out its banking business, which was virtually its entire business, to the Alamo State Bank, a corporation organized under the laws of Oklahoma and having its principal office and place of business in said City of Muskogee; and that as a part of said transaction said Oklahoma Trust Company then and there transferred to said Alamo State Bank its credit balance with the Hamilton National Bank of Chicago, including said proceeds of paving bonds amounting to \$21,252.40.

"3. That not only the business but also the principal portion of the assets of said Oklahoma Trust Company was so transferred and delivered to said Alamo State Bank on the 3rd day of January, 1910, and included were certain notes of P. J. Mc Nerney or The Mc Nerney Company, and that thereafter on or about the 7th day of January, 1910, other and additional bonds mentioned and embraced in said injunction having been sold by direction of said Oklahoma Trust Company, the proceeds thereof, to the extent of \$40,000, were turned over to said Alamo State Bank as a pretended payment on said Mc Nerney notes.

"4. That the aforesaid application of said \$40,000 was made with the consent and under the planning of said Alamo State Bank, acting through its agents and representatives; and in obtaining the benefit thereof, as well as in receiving the \$21,252.40 from the Chicago bank, said Alamo State Bank, through its agents and representatives, knew, or by the use of reasonable diligence could have known, that said funds, amounting to \$61,252.40, and each and every part thereof, were the proceeds of paving bonds protected by the injunction of this court.

"5. That \$20,000 of said \$40,000 was manipulated in the following way. Said Oklahoma Trust Company was indebted to the Commerce Trust Company of Kansas City, Missouri, in a large sum of money, and had pledged to secure said indebtedness certain valuable collaterals, a particular description of which the plaintiff is unable to give; that said collaterals, subject to the pledge, were included in said sale of the 3rd of January; and that upon receiving said \$40,000, on or about the 7th day of January, the agent and representative of said Alamo State Bank applied \$20,000 thereof on said indebtedness to the Commerce Trust Company and redeemed said collaterals for said Alamo State Bank.

"6. That plaintiff, through his solicitor, has demanded of said Alamo State Bank said proceeds of paving bonds so coming into its hands, and has requested that the same be turned over to the receiver herein; but said Alamo State Bank has failed and refused to surrender the same or any part thereof, and it is therefore in contempt of this court.

"Wherefore the plaintiff moves and prays the court to enter an order against said Alamo State Bank for contempt and peremptorily requiring it to immediately pay over to the receiver herein said proceeds of paving bonds so received by it, amounting to \$61,252.40, and that, in default of such payment, said receiver, or the marshal, or a sequestrator be directed to take the property of said Alamo State Bank, as under distringas, sequestration, or other appropriate writ, and to hold the same subject to such orders as the court, in the exercise of its proper jurisdiction for the plaintiff's protection, may make, and until said money shall have been restored or an equivalent sum paid over to the receiver. And he further prays for general relief."

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Complainant introduced in evidence his supplemental bill of complaint, filed September 12, 1910, in said equity cause 1239, which was as follows:

"Now comes the plaintiff, W. S. Farish, and, with leave of court first obtained, brings this his supplemental bill of complaint against the defendants herein.

"And thereupon your orator complains and says that since the bringing of his original bill of complaint herein and after the issuance and service of the writ of injunction on the 18th day of December, 1909, the defendant, Oklahoma Trust Company, sold, or allowed to be sold, all the paving bonds, mentioned in said original bill of complaint as having been delivered to said company by the City of Muskogee on the 13th day of December, 1909, except those issued on district number 64, at and for the sum of \$63,117.85; that of said amount \$21,488.20 was paid by the purchaser on or about the 28th day of December, 1909, and \$41,629.65 was so paid on or about the 7th day of January, 1910; and that said defendant has failed and refused to turn over said proceeds, or the proceeds of the previous sales mentioned in said original bill of complaint, and has undertaken to apply the same to its own use and benefit.

"Your orator further shows that, with full knowledge of the facts and of the plaintiff's rights, the defendants, P. J. McNerney, J. B. Jones and J. H. Huckleberry, wrongfully and tortiously aided, abetted, advised and encouraged said Oklahoma Trust Company in and about said transactions; that they and each of them conspired and confederated with said company and with each other to deprive the plaintiff of the proceeds of said bonds; that between the 31st day of December, 1909, and the 22nd day of January, 1910, said McNerney induced, required and compelled said company to apply or attempt to apply \$86,147.88 of said proceeds on a claim or pretended claim which it held against him; and that said Jones and Huckleberry were the managing officers and advisers of said company and moved and controlled it in said unlawful course.

"Wherefore your orator prays that the defendants and each of them be required to answer this supplemental bill of complaint, but not under oath, answer under oath being waived, and that on final hearing a decree be rendered requiring and compelling them and each of them to restore unto the plaintiff, or to deposit in court or with the receiver for the plaintiff's use, the entire proceeds of all of said paving bonds, or an equivalent sum of money; that compliance with such decree to enforce by execution, or other proper writ, and by order against the persons, as well as the property of said defendants; and he further prays as in his original bill of complaint and the amendment thereto he has prayed."

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Complainant introduced in evidence the joint and separate answer of The McNerney Company, Oklahoma Trust Company, P. J. McNerney, J. H. Huckleberry, and J. B. Jones, in said equity cause 1239, in the course of which, among other defenses that it is not deemed necessary to enumerate here, it was claimed by said defendants that the contracts mentioned in the bill of complaint in said cause—they being the same contracts mentioned in the bill of complaint in the present cause—copies of which are attached as Exhibits A and B, were executed without authority of Oklahoma Trust Company and were not binding on that company.

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Complainant introduced in evidence the general replication filed by him on December 5, 1910, in said equity cause 1239.

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Complainant introduced in evidence the final decree rendered by the court in said equity cause 1239, on September 5, 1911, in the language quoted in his first supplemental bill of complaint in the present cause.

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Complainant introduced in evidence an agreement dated September 23, 1910, which was signed by the complainant, The Texas Company, Oklahoma Trust Company, Alamo State Bank, and Union State Bank, as follows:

*"Whereas, W. S. Farish, of Houston, Texas, and The Texas Company, a corporation, of Texas, claim an equity in and lien upon assets and property of the Oklahoma Trust Company, assets and property of the Alamo State Bank, and assets and property of the Union State Bank, all corporations of Oklahoma; and,*

*"Whereas, it is the desire of these parties to segregate and set apart certain of the assets and property on which such claim is made, and thus save and avoid proceedings in court to that end;*

*"THEREFORE IT IS HEREBY AGREED:*

*"First. The notes and bonds embraced in list A, hereto attached and made a part hereof, are hereby placed in the hands of De Roos Bailey, of Muskogee, Oklahoma, and those embraced in list B will be obtained by said Oklahoma corporations from the present pledgees and placed in the hands of said Bailey within fifteen days from the date hereof.*

"Second. Said Bailey, as trustee for whom it may concern, shall use his best efforts to collect and reduce to cash said notes and bonds; and, as often as the cash funds in his hands shall amount to five hundred (\$500.00) Dollars, he shall deposit the same, less reasonable collection fees, to the credit of W. A. Ledbetter and A. L. Beaty, joint trustees, in the Commercial National Bank, of Muskogee, Oklahoma, or such other bank or depository as may be then designated by said Ledbetter and Beaty in a joint writing.

"Third. Said Ledbetter and Beaty shall jointly hold all funds coming into their hands hereunder for the party or parties who may be finally adjudged entitled thereto in equity cause 1239, entitled *W. S. Farish v. P. J. McNerney et al.*, now pending in the United States Circuit Court for the Eastern District of Oklahoma, at Muskogee, or in such other suit or proceeding as may involve said matters.

"Fourth. By the joint consent of said Ledbetter and Beaty, expressed in writing, said Bailey may sell, and in that way convert into cash, said notes and bonds, or any part thereof, in which event the proceeds shall be held and shall be applied as though it were a collection instead of a sale.

"Fifth. The Texas Company and W. S. Farish hereby waive any right they may have to the appointment of a receiver for the assets now in the possession of the Union State Bank, and accept the present arrangement, together with a certain bond in the sum of Twenty Thousand (\$20,000.00), this day given by said Union State Bank with security, as a full and complete substitute for such remedy.

"Sixth. Nothing herein contained shall be construed to prevent the assertion by ordinary procedure of a lien or claim upon the other assets or property of said Oklahoma corporations, or either of them, or upon the assets or property heretofore belonging to them, or either of them, or to prevent the interposition of any legal or equitable claim or defense not herein expressly foreclosed."

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Complainant also introduced in evidence a receipt and lists attached to the aforesaid agreement, which were as follows:

"*Receipt* of the notes and bonds shown in list A is hereby acknowledged, and I agree to act under the foregoing contract.

"DeRoos BAILEY.

## "LIST A.

No.	Name.	Amount.
5250	C. R. Rison .....	\$ 1,330.00
5296	J. R. Edington .....	755.00
5334	S. C. Pense .....	365.00
5039	Lelia A. Holt .....	2,000.00
5406	Jno. C. Clemons .....	827.00
802	W. H. Roeser .....	2,436.01
612	J. Cargile .....	1,537.50
748	Genesse Chemical Co. ....	4,590.00
5842	W. H. Barnes .....	7,500.00
829	S. G. Reed .....	4,106.66
5407	Jno. M. Lessley .....	575.00
430-432, 441	Ontario Pipe Line Co. notes.....	9,500.00
433	Bras, Higgins, Shoenfelt .....	455.50
669, 692, 730	J. H. Bradley .....	1,910.67
		<hr/> \$37,888.34"

## "LIST B.

Ontario Pipe Line Co. Bonds.....\$10,000.00"

Complainant introduced in evidence bonds that were shown to have been delivered to him by the principal maker on or about October 14, 1910, as follows:

*"Know All Men by These Presents:*

"That we, Union State Bank, a corporation, of Muskogee, Oklahoma, as principal, and Southwestern Surety Insurance Co. of Okla. as surety, hereby acknowledges ourselves jointly and severally bound to pay W. S. Parish and The Texas Company, or either of them, the sum of Twenty Thousand (\$20,000.00) Dollars.

*"This Obligation Is Conditioned,* however, that, if said Union State Bank shall well and truly pay off and discharge any and all final orders, judgments and decrees which, under claims now existing, may be obtained by said obligees, or either of them, subjecting the cash fund amounting to Eighteen Thousand, Eighteen and 58/100 (\$18,018.58) Dollars, transferred from the Alamo State Bank to said Union State Bank on or about the 25th day of August, 1910, or against said Union State Bank on account of its receipt and use of said fund, whether on motion or otherwise, in equity cause 1239 entitled *W. S. Farish v. P. J. McNerney et al.*, pending in the United States Circuit Court for the Eastern District of Oklahoma, at Muskogee, or in some other cause or proceeding, then this obligation shall become null and void, otherwise to remain in full force and effect.

*"It Is Expressly Agreed and Understood,* that any final order judgment or decree obtained in said cause 1239 subject-

ing said cash fund or any part thereof shall be binding on the makers even though said Union State Bank is not a party to said cause or proceeding.

*"It Is Also Expressly Agreed and Understood That nothing herein contained shall be construed to prevent said Union State Bank or any other party from making any defense in law or in equity which it would be entitled to make if it were a party to said cause or proceeding.*

*"Witness our hands this 14th day of October, 1910.*

*"UNION STATE BANK,*

*"By W. C. JACKSON, President,*

*"S. J. COLLINS, Cashier.*

*"SOUTHWESTERN SURETY  
INSURANCE COMPANY,*

*"By M. L. BRAGDON,*

*"Attorney in Fact (Seal)."*

*"Know All Men by These Presents:*

*"That we, Union State Bank, a corporation, of Muskogee, Oklahoma, as principal, and Southern Surety Company, of Oklahoma, as surety, hereby acknowledged ourselves jointly and severally bound to pay W. S. Farish and The Texas Company, or either of them, the sum of Twenty Thousand (\$20,000.00) Dollars.*

*"This Obligation Is Conditioned, however, that, if said Union State Bank shall well and truly pay off and discharge any and all final orders, judgments and decrees which, under claims now existing, may be obtained by said obligees, or either of them, subjecting the cash fund amounting to Eighteen Thousand Eighteen and 58/100 (\$18,018.58) Dollars, transferred from the Alamo State Bank to said Union State Bank on or about the 25th day of August, 1910, or against said Union State Bank on account of its receipt and use of said fund, whether on motion or otherwise, in equity cause 1239, entitled *W. S. Farish v. P. J. McNerney et al.*, pending in the United States Circuit Court for the Eastern District of Oklahoma, at Muskogee, or in some other cause or proceeding, then this obligation shall become null and void; otherwise to remain in full force and effect.*

*"It is Expressly Agreed and Understood that any final order, judgment or decree obtained in said cause 1239 subjecting said cash fund or any part thereof shall be binding on the makers hereof even though said Union State Bank is not a party to said cause or proceeding.*

*"It is Also Expressly Agreed and Understood* that nothing herein contained shall be construed to prevent said Union State Bank or any other party from making any defense in law or in equity which it would be entitled to make if it were a party to said cause or proceeding.

*"Witness* our hands this 14th day of October, 1910.

*"UNION STATE BANK,*

*"By W. C. JACKSON, President,*

*"S. L. COLLINS, Cashier.*

*"SOUTHERN SURETY COMPANY,*

*"By E. G. DAIN,*

*"(Seal)*

*"Secretary."*

J. H. HUCKLEBERRY, a witness introduced by the complainant, testified as follows:

My name is J. H. Huckleberry; occupation, a lawyer; residence, Muskogee, Oklahoma. I have inspected the list of notes given in the ninth paragraph of the bill of complaint, as requested to do. Said notes were held by the Hamilton National Bank of Chicago as collateral security. I made for Mr. A. L. Beaty a list of the notes which were held by the Hamilton National Bank as security and which notes were on hand and unpaid at the time I made the list. Said list corresponds with the list given in the ninth paragraph of the bill of complaint. I do not know whether said notes were held by the Hamilton National Bank on the third of January, at the time that Alamo State Bank purchased the property of Oklahoma Trust Company.

The fifty-thousand-dollar certificate of deposit or obligation which the Hamilton National Bank held was paid. When it was paid the collaterals were returned to Alamo State Bank.

I participated in some of the negotiations resulting in the transfer from Oklahoma Trust Company to Alamo State Bank on the 3rd of January, 1910. The property was all to have been delivered on January 3rd; quite a large portion of it was delivered on that day; some, however, was not delivered until several days thereafter. The notes that Oklahoma Trust Company owned were delivered on that date or afterwards. The notes were delivered to Alamo State Bank under the bill of sale; then afterwards I understand some of them were endorsed over to Alamo State Bank. Said notes which were endorsed were endorsed during the course of thirty or sixty days afterwards. I do not recall which notes were endorsed, nor how they came to be endorsed. I think the

endorsements were made as requested by officers of Alamo State Bank; I do not know for what purpose they were endorsed; I do not know whether it was because they were re-discounting them or something of that kind. I do not think I ever knew the amount of the notes that were endorsed, and, if so, I do not now remember it.

When the property of Alamo State Bank was turned over to Union State Bank my recollection is the notes were only delivered under the transfer. All the directors that I now remember of Alamo State Bank on the 3rd of January, 1910, when this transfer was made, are Walter Howard, W. C. Jackson, E. H. Hubbard, W. S. Kelso, T. H. Owen, E. M. Kerr, and W. B. Moore. The officers were Walter Howard, president; W. C. Jackson, vice-president; W. H. Pritchett, cashier; Benjamin Kaufman, bookkeeper. I have referred to the officers and directors as constituted before the transfer. At the annual meeting of stockholders Leo E. Bennett and J. H. Huckleberry were elected members of the board of directors. Some time after that, as I remember, Walter Howard resigned as president and Leo E. Bennett was elected president in his place. I do not remember the date when that annual stockholders meeting was held; it was some time after the transfer. T. H. Owen and E. M. Kerr knew of the pendency of this suit of *Farish v. McNerney* and others at the time that deal was made; none of the other officers and directors of Alamo State Bank knew anything about said suit at said time to my knowledge. We did not have any discussion of it, that I remember of, in any of those negotiations.

Union State Bank was organized in August, 1910, at practically the same time that the transfer to it of the assets of Alamo State Bank was made. Before it took over these assets Union State Bank did no business as a bank, but I think it owned certain moneys which had been subscribed before the transfer of the assets was made to it. I do not know whether or not it was organized for the purpose of purchasing the assets of Alamo State Bank and carrying on the business that bank had. The first directors of Union State Bank were Leo E. Bennett, W. C. Jackson, T. J. Collins, E. H. Hubbard, H. G. Baker, Carl Pursel, E. G. Davis and J. H. Huckleberry. The officers were W. C. Jackson, president; Leo E. Bennett and H. G. Baker, vice-presidents; T. J. Collins, cashier. Some of said officers and directors knew about the pendency of the suit of Farish against McNerney and others; W. C. Jackson, Leo E. Bennett and myself knew of it. Dr. Bennett had been president of Alamo State Bank. Mr. Jackson is a lawyer by profession; I do not remember whether Judge Jackson knew of the Farish-McNerney controversy at the time of the



organization of Union State Bank. There was not any discussion in the board of Union State Bank at the time of its organization, or about that time, of the suit that was pending.

*Cross Examination.*

I do not know whether Mr. Bennett knew the issues involved in the case of Farish against McNerney at the time of the transfer of the assets of Alamo State Bank to Union State Bank. There was a notice of some kind served by the plaintiff on Alamo State Bank; I do not remember the contents of the notice.

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T. J. COLLINS, a witness introduced by the complainant, testified as follows:

My name is T. J. Collins; residence, Muskogee, Oklahoma; business, cashier Union State Bank. I was one of the original incorporators of Union State Bank. I have held the position as cashier since its incorporation, August 25, 1910. With respect to what property Union State Bank had at that time, immediately after it was organized we purchased the assets of Alamo State Bank, or such as we would want, from the Bank Commissioner. We were to select what we wanted to take over as our own from the assets. I think the agreement was in writing. We assumed the deposits of Alamo State Bank and in doing so we selected from the bills receivable a certain amount and the balance was to be paid us by the banking board; I mean a balance sufficient to take up the deposits of Alamo State Bank. We turned the balance of the assets of Alamo over to the banking board. I believe from the statement the amount of Alamo State Bank's deposits at that time figures three hundred twenty-four thousand—right at that amount. That is what Union State Bank assumed. Union State Bank's capital was one hundred thousand dollars, organized under the state banking law. Union State Bank has protected those deposits; I mean by that that those who have checked against their deposits have been paid, except possibly six or seven thousand that yet hasn't been turned in but still outstanding. Those calling for their money have all been paid. I mean they have all been paid except six or seven thousand dollars and they will be paid when they call for their money.

I believe Alamo State Bank had purchased some of this same property, some of these same assets, from Oklahoma Trust Company in the preceding January; I had no personal knowledge of the transaction at the time. I believe Union State Bank took something like two or three notes that were payable to Oklahoma Trust Company. I do not know ap-

proximately what the amount of deposits of Oklahoma Trust Company was at the time Alamo State Bank assumed its deposits. I never, to my knowledge, saw records or statements in the office of the bank indicating approximately.

I could not say what was done by Alamo State Bank with the depositors of Oklahoma Trust Company, as to whether they were paid or protected up to the time that Union State Bank took over Alamo State Bank; I was not connected with Alamo Bank. I could not say and do not know whether any of these depositors whose payment my bank assumed were the same depositors whose payments Alamo assumed when it made its purchase.

I have a statement showing the amount of the notes that we took over out of the assets of Alamo State Bank. I have a partial list of notes that we did not take over, that the banking board got, but that list has been mussed around until I would not say I had a full list of it. I hand counsel for complainant a list which has: "Notes accepted by the Union State Bank, from the Alamo State, Sept. 6th." Then it proceeds to give number, name, amount, date due, and consists of three pages; after which there follows another list of something over a page, and another list of a page, and then a list of one page showing notes accepted September 17, 1910; and then another page, notes taken over January 12, 1911; and still another page, notes taken over January 17, 1911. These several pages show the notes that my bank received under that purchase which was consummated through a court order and by the bank commissioner; the total of it, I think, is about a hundred and forty thousand dollars. I can tell a partial list of these notes which have been paid and which have not been paid to my bank; some on there have been partly paid and renewed up into our own bank. The check mark opposite the names on said list indicates the notes we still have and some show no payments; others have been partially paid. Most of the notes that are not checked have been paid; that is not exact, possibly; there might have been another one or two, but that is the greater portion of them.

I have a partial list of the notes that were not accepted, but which went to the state banking board; I have a list of Alamo State Bank but not of Oklahoma Trust Company; I believe this paper I hand the attorney for complainant is a partial list of Alamo which were not accepted. Said paper is dated January 17, 1911, "Alamo notes not taken over by Union State Bank at this date." That is the list to which I refer, and it did not include Oklahoma Trust Company notes. —This is the sheet here of the Oklahoma; I did not know I had it. This sheet is a list of the notes that I have referred

to, that is, the notes of Alamo which Union State Bank did not accept, and also comprises a list of Oklahoma Trust notes that we did not accept. I do not mean that the first page embraces Oklahoma Trust Company's notes; the first sheet embraces Alamo notes, and then there are two sheets attached headed "Oklahoma Trust Company notes unpaid March 11, 1911;" that represents certain Oklahoma Trust Company notes which had come into the hands of Alamo State Bank and which my bank would not accept. These notes then went to the State Banking Board, unless they were put up in the hands of Mr. Bailey as trustee under the agreement that was made some time after my bank was organized. In other words, all the notes in this last mentioned schedule went to the banking board except such of them as went into the hands of Mr. Bailey as trustee. (Here followed lists of notes, and one of these lists showed Oklahoma Trust Company notes unpaid, March 11, 1911, \$418,913.94.) I have no way of telling which of those notes that were turned over to the state banking board have been collected.

I believe Mr. Cockerel drew the incorporation papers of Union State Bank. I think Mr. Ledbetter was here at the time of the incorporation. I think Mr. Ledbetter put the Alamo State Bank matter through the court.

#### *Cross Examination.*

I was present when Union State Bank was organized. I was present at the first meeting of directors and stockholders. At that time an arrangement was made with the bank commissioner by which the assets of Alamo State Bank were to be purchased by Union State Bank. That arrangement was consummated. The bank commissioner executed a written conveyance to Union State Bank of the assets that were transferred. I think I have a copy of that conveyance.

The notes originally given to Oklahoma Trust Company, and mentioned and described in the list referred to in my testimony on direct examination, were sent to the board or the bank commissioner. They were so sent by Union State Bank. Union State Bank got them by the purchase of Alamo State Bank. They were on the list of notes that were turned over to Union State Bank. The whole list was turned over to him; this list made more notes than were carried on the Alamo books. I am not so familiar with the notes that were turned over to the banking board which originally were held by Oklahoma Trust Company; I just saw them; I could not say whether said notes were solvent or insolvent; we did not consider them good enough for us to take over. The understanding between us and the bank commissioner was that we were to take over the solvent notes and reject the insolvent notes. We did that so far as we considered the notes

good, and the bad notes we sent to the banking board. The purchase from the bank commissioner of the assets of the Alamo took place immediately after the bank commissioner took charge—the same day.

*Redirect Examination.*

The notes themselves were not endorsed over.

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It was admitted and agreed that the depositors of Oklahoma Trust Company, payment of whose claims was assumed by Alamo State Bank in the transaction of January 3, 1910, have been paid in full, except those mentioned by Mr. Collins in his testimony, and these will be paid in due course.

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A. L. BEATY, a witness introduced by the complainant, testified as follows:

I am one of the solicitors for the complainant in this case. I prepared the bill of complaint a short time before it was filed. A short time thereafter I had an auditor, Mr. L. A. Smith, of Houston, meet me in Muskogee for the purpose of investigating the books, accounts and affairs of Oklahoma Trust Company at Alamo State Bank. Mr. Ledbetter, of counsel for the defendants, was here also. The management, which was then really the management of Union State Bank, had custody of a great many books, records and documents relating to business which had been carried on by Oklahoma Trust Company and its successor, Alamo State Bank; that is, we went into it fully enough to ascertain what we desired. My recollection is that Dr. Bennett was here in Muskogee at that time and possibly assisted us some with information. We found correspondence passing between Oklahoma Trust Company and Alamo State Bank and Hamilton National Bank of Chicago. I should state also that Mr. J. H. Huckleberry assisted in the investigation and it seemed that all of the parties mentioned were desirous of ascertaining the exact facts based on the records of these banks. I made up statements, or did so with the assistance of the auditor, Mr. Smith, which will be found copied in the bill of complaint. The statement of notes held by Hamilton National Bank of Chicago on January 3, 1910, and surrendered on or about April 15, 1910, is correct according to the records of said banks, that is, Oklahoma Trust Company and Alamo State Bank, as said books were examined and the result marked down at the time. I have before me typewritten statements which according to my best recollection were furnished me there in the bank at the time of this examination. My recol-

lection is that the statement had been made up with carbon copies. I am reasonably sure that these statements which I hold in my hand were obtained from the management of Union State Bank or from Dr. Bennett, who was the president of Alamo State Bank; at any rate, they were taken with the consent of whoever had charge of the records there in the bank. The notations in pencil "All paid" and "here" in the nine places where the word "here" appears on the first page, together with the words "Paid to Alamo August 27th \$750.00" and the memorandum "\$7500 2-15-10 10-1-10," are in my handwriting and did not appear on the sheet as I received it. On the second page the name "Hno Lindley" was scratched out and the name "John H. Lesley" written above by me, it having been disclosed by the bank records that Lesley was the correct name. The notation in pencil opposite the amount of the Lesley note, namely, "Paid \$100 to A after bal ext Oct 3" was made by me after I received the instrument. So also the words "at Guthrie" appearing twice on the sheet, the word "here" and the words "Hamilton, Ont." were written by me in pencil. The amount "\$153.50" on next to the last page it disclosed was incorrect and I wrote in pencil opposite same "\$1537.50". The erasures and interlineations on the last page are in the handwriting of Mr. Smith, the auditor, but the heading seems to have been correct originally. I do not think there is any error in the schedule of notes contained in the ninth paragraph of the bill. I realize, of course, that it is possible for it to be erroneous, but I do not think it is. All of the allegations were framed with the purpose of being accurate and those in the ninth paragraph constitute no exception. I have since tried hard to find some one who can testify to the facts in connection with the collaterals which were held by Hamilton National Bank of Chicago January 3, 1910, or to find the bank records showing the facts. Mr. Ledbetter was kind enough to go with me to the bank where these records are supposed to be kept, and Mr. Collins, the cashier, gave us free access to the vault, but we could not find the files or books we were looking for. It was first stated that some of these had been taken by a bank examiner, Mr. Crow, but was later stated that some of them had been sent to Judge Jackson's office. Mr. Ledbetter called Mr. Crow on the 'phone and he and I went to Mr. Jackson's office and looked through the cabinet and file which he had. We were unable to locate the desired records.

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Complainant then introduced the lists of securities identified by the witness A. L. Beaty, but it is not deemed necessary to insert these lists in the statement of facts.

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It was stipulated and agreed between the parties that the testimony taken in equity cause 1239 might be introduced in evidence in this cause, and such testimony was so introduced in evidence as follows:

It was stipulated between the parties in said equity cause 1239 as follows:

"That the statements made in paragraphs I, II and IX of the plaintiff's original bill of complaint are true.

"The statements made in paragraphs IV of the plaintiff's original bill of complaint in reference to the procurement of paving contracts with the City of Muskogee and down to the allegations of a contract between the parties to the suit are true.

"The statements made in paragraph VI of the plaintiff's original bill of complaint are true, except the allegation that the bonds therein mentioned were delivered to the Oklahoma Trust Company.

"On the 5th day of January, 1909, and on the 14th day of June, 1909, certain parties to this cause signed contracts, which are copied in paragraphs III and IV of the plaintiff's original bill of complaint, and these contracts were, on said dates, duly delivered. Said contracts as copied in said bill of complaint correctly show the names of the signers, but this stipulation shall not be construed as an admission that the parties who signed the name of the Oklahoma Trust Company and J. B. Jones to said contracts had authority to do so.

"The Texas Company furnished a paving outfit, consisting of a paving plant and two steam rollers, which The McNerney Company used in doing the paving work mentioned in the plaintiff's original bill of complaint, which work exceeded 100,000 square yards. The paving bonds delivered by the city on the 17th of August and 24th of November, 1909, were sold by Oklahoma Trust Company at 91 cents on the dollar.

"On the 29th day of June, 1909, The Texas Company delivered to the mayor of Muskogee a letter, which is correctly copied in the plaintiff's amendments to his original bill of complaint, and thereafter, within thirty days, at the suggestion of the mayor, left with him copies of said written contracts of 5th of January and the 14th of June, 1909.

"On the 9th day of December, 1909, The Texas Company executed and delivered to the plaintiff a written transfer, which is correctly copied in the plaintiff's amendments to his original bill of complaint.



"It is further stipulated and agreed that the execution hereof shall be without prejudice to any of the matters omitted or saved and excepted, and that in respect to these any party shall be at liberty to introduce evidence."

Also A. F. McGARR, a witness introduced by the complainant, testified as follows:

I hold the official position of mayor in the city of Muskogee. I have been mayor since May 3, 1909. I recall that paving contracts were made between the City of Muskogee and P. J. McNerney or The McNerney Company. I have not looked up the date of those contracts. I have looked up the dates when the bonds were delivered. I cannot give the amounts of each delivery of bonds; I just simply looked up the date when the one delivery of bonds was made in several different districts; I refer to the 13th of December, 1909. I have not looked up the date of the different deliveries; the city clerk has it. I recall the delivery of bonds that was made about the 13th of December, 1909; I do not remember what bonds they were, of my own recollection; I remember approximately the amount; the amount, face value, was between seventy-five and eighty thousand dollars. Those bonds were delivered to J. B. Jones of Oklahoma Trust Company, whose official position with said trust company at that time was president. The bonds were delivered in the mayor's office in the city hall. Another person tried to get the bonds on that occasion; that other person was B. B. Wheeler; that was the same day.

Said bonds were delivered about eight o'clock in the evening. They were delivered following a called meeting of the council; the meeting had adjourned. All the negotiations with reference to the delivery of the bonds took place in the clerk's office and the mayor's office. The parties who were present at the delivery were B. B. Wheeler, and Charles Wheeler, the city clerk, and Joe Phelan, the city auditor, J. B. Jones and E. M. Kerr and myself. There had been some talk or discussion of the matter preceding the delivery of the bonds.

After the necessary legislation was passed authorizing the delivery of these bonds they were checked several times in the clerk's office and were afterwards gone over by Mr. Wheeler, the attorney for The McNerney Construction Company. After they had been thoroughly checked I suggested that they be taken to my office where they would make the final check and make the delivery, and Mr. Phelan, Mr. Wheeler and myself retired to my office, and they then again checked them, making a list of the bonds and the amounts, as I recall

it, in the several districts. After that check had been made the question of the delivery came up, and I asked if Mr. Jones was present to receive the bonds, and they said he was not, but that Mr. B. B. Wheeler was representing Oklahoma Trust Company, and that he would receive them on behalf of the company. I refused, inasmuch as he was also representing Mr. McNerney—that it would be well to have some officer of the trust company that was not acting in a double capacity or dual capacity, and insisted on Mr. Jones being there and receiving the bonds. There was some discussion about whether that was necessary or not, and I insisted that it be done, that he would have to come and get them before I would deliver them. We called Mr. Jones on the 'phone and he said it would be all right to deliver them to Mr. Wheeler. I told him Mr. Wheeler was representing the contractor and the bonds had been assigned, and it had been agreed between and by the two assignees that delivery to him, Jones, would be all right; and I think possibly after some minutes parleying he said he would come and did come. All the bonds that were delivered that day were actually handed to Mr. Jones.

#### *Cross Examination.*

Possibly the resolution passed by the council directed these bonds to be delivered by the city clerk and not by the mayor—I do not remember. I think such resolution also directed that they be delivered to P. J. McNerney or The McNerney Company, depending upon to whom the contract was given in the special district. Mr. Wheeler and Mr. Kerr had both been before the council meeting, and both of them were present during the time the bonds were being checked. Several hours passed from the time the council meeting adjourned until the delivery was finally made. Mr. Wheeler did not take the bonds as attorney for Mr. McNerney and The McNerney Company, respectively. He did not make demand for them as attorney for The McNerney Company. He made demand for them as attorney for Oklahoma Trust Company. That demand was made in the presence of Mr. Phelan, Mr. Wheeler, Mr. Kerr and myself. I testified in this case once before. I do not know that I testified at that time that Wheeler demanded the bonds as attorney for Oklahoma Trust Company, but he requested that I deliver them to him as the representative of Oklahoma Trust Company. Mr. Kerr was present at that time. I think I did state in my examination before that this request was made by Wheeler that the bonds be delivered to him as attorney for Oklahoma Trust Company. I did not have any reason to believe that Mr. Wheeler, when he made that statement, was misrepresenting the matter to me. With respect to whether or not it is the custom to deliver bonds to

the representative or attorney of any contractor to whom they were directed to be delivered by the council, bonds have been delivered in some instances that I know of to representatives. I never did see Mr. Wheeler with these bonds in his hands at all. I believe a short time after Mr. Jones came to my room there was a telephone call for him; I do not remember who he said was waiting for him at that time, but he said some meeting was waiting for him, and shortly after that he left the room. Shortly after that they all left. Mr. Jones did not leave before the others did; I am positive of that.

When the bonds were delivered to Mr. Jones he did not deliver them over to Mr. Wheeler at once, and Mr. Wheeler did not again check the amount in my room. Mr. Jones may have passed the bonds to Mr. Wheeler, but Mr. Wheeler did not check them, and Mr. Jones did not pass them to him in my room; I am positive of that; I was the last one in the room. I mean that so far as I know Mr. Wheeler did not have the bonds in his hands after they were delivered to Mr. Jones. I am not positive that Mr. Jones took them out of the room. I do not really know what Mr. Jones did with the bonds when I handed them to him. I might explain just the situation: We had in the room a table similar to this one. I was sitting on one side, Mr. Wheeler, the city clerk, was on that side, and Mr. Phelan on the other side, and Mr. Jones stood between them. I had the bonds at my right and Mr. Wheeler had a record. As I checked up the bonds, Mr. Jones, who also had a list, checked them off as they were called, and they were laid in front of Mr. Jones, and after they had been checked he laid down the list he had of them, and picked up the bonds. Other than that I do not know what Mr. Jones did with them. In this statement the Mr. Wheeler I refer to was the city clerk. The city clerk makes the delivery of the bonds. I would like to correct my testimony to that effect, that the bonds were passed from me to the city clerk and laid in front of Mr. Jones after they were checked. As to whether I was just kind of bossing the job that particular night, I had word to the effect that the bonds would be taken by certain parties and I was trying to sit on the lid as long as I could. That certain party was McNerney Brothers.

*Cross Examination on Behalf of P. J. McNerney and The McNerney Company.*

The word I had that the bonds would be taken came to me through the city councilor. I do not think he requested me not to give them to Mr. McNerney. I think the resolution reads that the council directed the city clerk to deliver the bonds to Mr. McNerney, and the resolution did not direct me to do anything with them as to delivery. I will explain why

I took it upon myself to take the action I have just related. The bonds in these particular districts were assigned to three different parties—Oklahoma Trust Company, The Texas Company, and Mr. McCluskey, of Oklahoma State Bank, I think it was. Those three assignments were filed in the clerk's office. Two of the assignees—Oklahoma Trust Company and The Texas Company, as I was informed—bought the claim of the bank and dismissed the assignment as to the bank. Those were all matters of record in the clerk's office. That left two assignments of the bonds. It was agreed between these two assignees that a delivery to either would be legal and proper. While the legislation shows that the bonds were to be delivered to the contractor, it is still a matter of record that those assignments were made a matter of record in the clerk's office, and in order to keep the transcripts straight and not inject into the transcript that the bonds had been transferred, I took the action I have just related. That was not mentioned in the council. I was representing the City of Muskogee in this transaction. These assignments I speak of that were on file before the city council ordered the clerk to deliver the bonds. I did not in violation of that order take the action I did; I did not consider it a violation. I was not representing any of these contending parties at that time. After the bonds had been passed, as I have stated, across the table to the city clerk and then to Mr. Jones to be checked, I do not remember what Mr. Jones did with them. The bonds before they were passed over were folded; I would not insist that they were not rolled up in a round roll; they were not spread out, is what I mean. I think each district was in a separate roll. When the bonds were passed to Mr. Wheeler and to Mr. Jones, neither Mr. Jones nor Mr. Wheeler, after they were checked by Mr. Jones, rolled the bonds up in the same manner they were before. I think after the bonds were checked by Mr. Jones they never were in the hands of Mr. Wheeler or myself. It is not a fact that as soon as they were checked by Mr. Jones they were rolled up and passed back to me; that is not true. It is not a fact that I was sitting at the table with my arms like this (indicating) and that the bonds were placed right in my arms, and it is not a fact that Mr. B. B. Wheeler reached over and took them out. Mr. B. B. Wheeler may have taken the bonds out of the room; he did not take them from between my arms after they were checked up; I am absolutely positive; there is no way of my being mistaken about that. I do not know about my being just as positive about that as I was that Mr. B. B. Wheeler represented Oklahoma Trust Company; I would not be positive that he represented Oklahoma Trust Company, but I wanted to avoid the delivery of the bonds to anybody representing

two parties or persons. It is a fact I objected to delivering the bonds to Mr. B. B. Wheeler on the ground that he was representing The McNerney Company and McNerney; I was avoiding any delivery to The McNerney Company. I was doing that in spite of the fact that the resolution directed that they should be delivered to The McNerney Company, if counsel cares to put it that way.

*Cross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

I would not care to have it in the records what city councilor spoke to me about this matter. This was a matter of secret information that came to me; I do not care to divulge his name unless I am forced to. I got my information that The Texas Company and Oklahoma Trust Company had agreed that a delivery to either would satisfy them from Mr. Beaty and Mr. Jones. I got such information from Mr. Jones at the time that the bonds were delivered to him on, I think, possibly the bond delivery antedating this December 13th delivery. He told me to deliver them to either The Texas Company or Oklahoma Trust Company—not in those words, but that is the substance. I do not think it was more than a month prior to the December 13th delivery. The only thing I remember about the delivery of the bonds in August is that the bonds were delivered to Mr. Wheeler and Mr. Jones for Oklahoma Trust Company. I had no reason to believe Mr. Wheeler was not the attorney representing Oklahoma Trust Company. Mr. Wheeler told me that night that he represented Oklahoma Trust Company and Mr. Jones also told me he was representing them.

*Recross Examination on Behalf of P. J. McNerney and the McNerney Company.*

It is a fact that Mr. Jones told me it would be all right for me to deliver the bonds to Mr. B. B. Wheeler that night. It is not a fact that he did not state that Mr. Wheeler was a representative of Oklahoma Trust Company; he said Mr. Wheeler was representing the company and a delivery to him would be all right.

*Recross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

I think Mr. McNerney's receipt for the bonds was taken by the city clerk. I do not believe we took a receipt from either Jones or Wheeler. I testified at the last trial that such a receipt had been taken, but I discovered I was mistaken.

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Also CHARLES WHEELER, a witness introduced by the complainant, testified as follows:

I am the city clerk of the City of Muskogee, and have been clerk since May 3, 1909, I believe. I recall the matter of the delivery of some bonds by the city on or about December 13, 1909. Those bonds were delivered in the mayor's office, city hall, in Muskogee; I could not say exactly what time it was; it was between seven and eight o'clock. Those present at the time of the delivery were Mr. McGarr, Mr. B. B. Wheeler and Mr. J. B. Jones, Mr. Phelan, and I think Mr. Kerr, and myself. The bonds were delivered to Mr. J. B. Jones. I handed them to Mr. Jones, with some assistance; I mean by that that Mr. McGarr was present. We had been there at that session for some little time before the bonds were delivered; I could not say how long we had actually been in the room; I should say we had been around there a couple of hours. The cause of the delay seemed to be some trouble about who was to get the bonds, and Mr. McGarr seemed to be rather suspicious about something—I did not know what. I only knew that my assignment led up to Mr. Jones and that the resolution called for delivery to Mr. McNerney, and Mr. Jones came and got the bonds and McNerney signed the receipt. I do not know what Mr. Jones did with the bonds after they were delivered to him.

I have with me my files or data from which we can take the different paving contracts that McNerney and The McNerney Company had, and from which I can give counsel the date of the contract and the dates when the bonds were delivered; I could not say that it is all the contracts he had; I have twelve contracts in my list. The dates of the contracts I have in my list are as follows:

District 15 A, June 1, 1909.  
District 15 B, June 1, 1909.  
District 17, November 18, 1908.  
District 25, November 18, 1908.  
District 26, November 25, 1908.  
District 27, November 25, 1908.  
District 29, November 18, 1908.  
District 33, November 18, 1908.  
District 35, November 18, 1908.  
District 45, March 1, 1909.  
District 64, June 1, 1909.  
District 66, June 1, 1909.

The bonds on District 15 A were delivered to Mr. Fink, receiver July 30, 1910; the amount of bonds that were delivered was \$23,094.92.



The bonds on District 15 B were delivered to D. N. Fink, receiver, July 30, 1910; the amount, face value, was \$7,792.64.

The bonds on District 17 were delivered to Mr. Fink, receiver, \$3,000.00 on July 13, 1910, and Mr. Jones received \$16,166.69 on August 16, 1909. I hold one bond of \$1,000.00 yet.

The bonds on District 25 were delivered in two separate batches. \$12,471.89 were delivered on July 13, 1910, to Mr. Fink; \$44,720.00 were delivered December 13, 1909, to Mr. Jones, assignee, for Mr. McNerney. I mean by "assignee for Mr. McNerney" that Mr. Jones of Oklahoma Trust Company was assignee for Mr. McNerney, under assignment held by the city. I do not recall just any one special assignment. Those were McNerney's bonds and they went to McNerney through Jones. I mean that the assignments led up to Jones, that the assignments authorized the delivery of the bonds to Oklahoma Trust Company. That is what I mean by saying Jones was assignee for McNerney.

On District 26 there were two deliveries of bonds made and one batch turned back. The whole issue on District 26 was delivered to Oklahoma Trust Company on October 29, 1909, and \$8,000 was delivered by mistake, and later that \$8,000 was delivered to Mr. Fink on July 13, 1910. That left the amount of the delivery for Oklahoma Trust Company \$14,590.96.

On District 27 it was the same way as on 26. The whole issue, \$31,304.10, was delivered to Oklahoma Trust Company on October 29, 1909, and \$7,130 in bonds returned. They were delivered by mistake by the city. Later \$1,000 was delivered to Mr. Jones of Oklahoma Trust Company on December 13, 1909, and \$6,100 on July 13, 1910, to Mr. Fink.

On District 29, \$24,000 of bonds were delivered to Mr. Jones of Oklahoma Trust Company on August 16, 1909, and \$5,720.43 delivered to Mr. Fink July 30, 1910.

On District 33, \$23,301.87 were delivered to Mr. Jones of Oklahoma Trust Company on December 13, 1909.

On District 35, \$22,809.22 of bonds were delivered to Mr. Fink July 30, 1910, and \$13,539.47 were delivered to Mr. Fink May 13, 1910.

On District 45, \$13,471.71 of bonds were delivered on April 30, 1910, to Mr. Fink, and \$13,471.75 of bonds were delivered to Mr. Fink on July 13, 1910.

On District 64, \$10,082.80 of bonds were delivered to Mr. Jones of Oklahoma Trust Company on December 13, 1909, and \$1,700 to Mr. Fink, July 13, 1910.

On District 66, \$23,875.80 of bonds were delivered to Mr.

Fink on September 22, 1910. I would like to say that I have taken these figures off of data and have not checked them.

These bonds that I have undertaken to give represent the entire issue of those districts. I withheld \$1000 on District 17, which I mentioned. That \$1000 was issued, however, and is held back now as against some engineering fee.

I do not know personally whether the work on these districts was in a completed or incompleted state at the time the receiver, D. N. Fink, was appointed by the court in this case. I do not keep up with that work; I merely keep informed along, but I would not say officially. The full and final bonds, the entire installment in all the districts, have been delivered, with the exception of that one bond that has been held back.

*Cross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

The testimony I have given corresponding to the amount paid has been on receipt. Not all of those receipts are signed by McNerney or The McNerney Company. Part of them are and part of them were delivered to Oklahoma Trust Company. I think P. J. McNerney and Oklahoma Trust Company are the only two that signed the receipts. During all this time legislation was going on before the council Mr. B. B. Wheeler was representing McNerney and The McNerney Company for these receipts here; I do not remember just what Mr. Wheeler at that time represented; that is my impression. I think that from July, 1909, up until the last legislation Mr. Wheeler was before the council nearly every meeting representing McNerney or The McNerney Company; he was there—I know that.

In regard to the bonds in Improvement Districts 26 and 27, that I have said were delivered October 29, 1909, it is true that they had been issued before that time and returned back and re-issued. I think the date of the first delivery was August—something like August 18th, I think. The bonds that were issued on August 18th were returned, as I remember, and destroyed—burned. These new bonds, issued on October 29th, were issued in place thereof. During all this time it was my understanding that Mr. Wheeler was representing Oklahoma Trust Company; I do not remember his ever telling me so directly, but that was my understanding. I do not know when I got that understanding, but it was the impression in my office. I think he was representing Oklahoma Trust Company in this capacity; I do not say that he was general counselor, but it was my impression that he was representing Oklahoma Trust Company. I am not prepared to say positively that Wheeler made a representation to me that

he was representing Oklahoma Trust Company. The impression that I have now was not gained since this litigation started. I did not hear Mr. Wheeler say directly on the night of December 13th that he represented Oklahoma Trust Company; I heard him say he wanted the bonds for Mr. Jones. It is a fact that McNerney was there behind Wheeler, and McNerney was claiming the bonds for McNerney and The McNerney Company. It was my understanding Mr. Wheeler was acting for both; I did not have any direct information to that effect. I had no direct information, but I took the receipt from McNerney.

I do not think Mr. Wheeler walked out of the room with those bonds; I am not sure. I do not remember that I have testified in this same matter, in reply to the question: "Is it not a matter of fact Mr. B. B. Wheeler actually took those bonds out of the mayor's office?" that "I believe he carried them out of the room; I am not positive." Mr. Wheeler seemed to be rather angry because we would not give him the bonds. I really do not remember as to whether Wheeler took them out of the room or not. This testimony was taken along when my recollection was fresher than it is now; that is sometime ago; I might have been mistaken then—I could not say; I would not like to.

I think there was a telephone call for Mr. Jones shortly after he came in. I think my testimony before was correct, as follows "Q. Don't you remember after he came there, the mayor told him there was a telephone call for him and he said he had to go because the bank commissioner was wanting him? A. I believe there was; I didn't pay any attention."

*Cross Examination on Behalf of P. J. McNerney and the McNerney Co.*

The one thousand-dollar bond, District 17, was ordered delivered with the other bonds. It was just a dispute between the receiver, Mr. Fink, and myself that made me hold that up, but it has already been ordered delivered.

*Redirect Examination.*

The bond has not been delivered. I have the bond in my safe.

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Also H. Y. NEWSUM, a witness introduced by the complainant, testified as follows:

At present I am living at Sour Lake, Texas. I am cashier and warehouseman for The Texas Company. I do not remember whether it was 1903 or 1904 that I went to work for The Texas Company. In the year 1909 I was in Muskogee,

acting as auditor for The Texas Company, in the office with P. J. McNerney and The McNerney Company. I left Houston the morning of January 4, 1909, and got to Muskogee the day after and went to work the next morning, and continued in that capacity at Muskogee until the first week in the following December, of the same year—I do not remember now the exact date.

The work I did was, I kept the accounts and paid the men with The McNerney Company off. The McNerney Company got the money to operate on from The Texas Company, from Houston. P. J. McNerney was with the firm of McNerney Company. P. J. McNerney was the man that had the contracts. The books were kept, and the payments were made, and the men were employed, in the name of The McNerney Company. None of the business was carried on in the name of P. J. McNerney; it was The McNerney Company.

The money that The McNerney Company got from The Texas Company was used for paving work. They had paving contracts with the city for different streets. There were something like twelve or thirteen districts—15 A, 15 B, 17, 25, 26, 27, 29, 33, 35, 64, 66, and 45. We did the banking business with Oklahoma Trust Company. When money was furnished by The Texas Company it would come addressed to me and payable to me. It would come in the shape of a check. I would place it in Oklahoma Trust Company to the credit of The Texas Company. It was checked out by my signature on the check of Mr. J. A. Handy. J. A. Handy was superintendent in charge of the construction, sent to Muskogee by The Texas Company. Vouchers were kept covering the disbursements. Every bill that was paid was covered with a voucher. I do not know whether the originals of vouchers that were actually used or taken are here in court; the copies thereof are here. The copies that are here are correct copies of the original vouchers. These vouchers cover the actual disbursements of money as they were made by me, checking on The Texas Company account in Oklahoma Trust Company, and paying the bills of The McNerney Company. They covered the disbursements of The McNerney Company. The connection those bills and disbursements had with the paving work was that those bills covered material, such as cement, sand and gravel, and covered the labor of the excavation, curb and gutter, concrete work and plant work, the mixing where they mixed the asphalt. There had been some of the work sublet by the contracting company, and some of these vouchers were to the sub-contractors. As to my salary, The Texas Company sent my check to me and I sent a voucher for that; I was paid out of the Houston office; I did not pay myself out of the

funds in Muskogee. I think Mr. Handy's salary was delivered in the same manner. These vouchers that are here in court do not cover anything except material or labor or sub-contractors' pay or expense of some kind in connection with these paving contracts. I cannot recall right at present any items of foreign nature in the vouchers. The original vouchers were mailed; I do not know what finally became of them, where they are now.

I did not work in the McNerney office with the balance of the office force. There were several rooms and I had a room to myself; it was all in the McNerney office. Besides these vouchers, I kept a journal and ledger and a cash book, and then there were two or three memorandum material books that I kept. I kept a record by which I could separate the expenditures that were made on the different streets, by which I could distinguish the expenditures of one street from that of another. The material would come in and we would give it to the sub-contractor, and he would use it on whatever street he was on, and when it was finished then we would take our total cost from his estimate. The material was all charged to the sub-contractor. I had a record as to where the material was used. The sub-contractor would have to bring in an estimate to show where the material went, so he could get his money. From the records I kept I could tell what money had been laid out on each district. I do not know where those records are now. I have not possession or control of them. They were forcibly taken away from me one afternoon—I cannot recall the exact date; it was either the fifth or sixth, possibly the fourth, of December, 1909. They were taken away by P. J. McNerney, Mr. Chaney, Mr. Webber and Ed. McNerney; that was all that were there at the time, I think. P. J. McNerney did the talking. I say they were forcibly taken from me. I saw the records right after they were taken from me, but since then I have never seen them.

By being "forcibly taken from me" I mean: It was right after dinner. I roomed over at the Missouri hotel. I went over to the room after something, put on a clean collar, as well as I remember, and P. J. McNerney called up over the telephone and said he wanted me to come over to the office right away. So I went over, and as I walked into the office he was sitting down with his feet up on the desk, on the seat that I generally used, and on the other side sat Mr. Webber, Mr. Chaney and Ed. McNerney. He was eating a sandwich, as well as I remember—eating something; I do not know whether it was a sandwich or not. As I walked in he arose and walked around to the side of the desk and I went on—I

had a paper or something in my pocket that I intended putting in my desk—and Mr. McNerney walked behind the flat-top desk and in front of the standing desk and came right up close to me, right up face to face, and said he wanted the books that were in the safe. I asked him what he wanted with them and he said it didn't matter what he wanted with them, he wanted them. I says: "Well, Mr. McNerney, if you tell me what you want, and if there is anything in there you ought to see, I will tell you, but I don't know why there is all this demonstration to get the books. You must want them for some other purpose or you certainly wouldn't come in here in this way in order to get the books." I says: "If you will wait just a minute, it will only take a few minutes to wire Judge Beaty, and if he says to turn them over to you, all right." Mr. McNerney says: "To hell with Judge Beaty; those books belong to me, and I am going to have them." I says: "You will never get them from me." He says: "You won't leave this room alive unless you give them." I says: "All right; you won't get them." He caught hold of me and tried to make me give him the combination to the safe and I wouldn't do it. That talk took about ten or fifteen minutes. He was trying to get me to give him the combination to the safe and I wouldn't do it, and in the meantime he threatened to kill me and dynamite the office and dynamite the safe, and then, as a last resort, I suppose, to frighten me, he said he was going to have me arrested for embezzlement, and he telephoned Judge Bailey, justice of the peace. He tried to telephone two or three times, and finally there was some talking; I do not know whether they ever got Judge Bailey or not; they were talking at that end of the phone like they had him, but I do not know what Judge Bailey said to him or anything else. The telephone was in the next room. So then he came back and P. J. was in the room all the time. I forget now whether it was Ed McNerney or one of the other boys that went to the phone. So P. J. said if I didn't give him the combination to the safe I would never leave the room alive, and I told him I did not intend to. So then he pushed me down over the flat desk and choked me a couple of times and then let me up. As I got up he shoved me clear across the room up against the door—had me on the shoulders and throat and shoved me up against the door—and then Ed. rushed up and shoved P. J. to one side, and told P. J. not to hit me, that if there was anybody to hit me he wanted to be the man to do it. Then the matter kind of died out for a few minutes. Then the thought struck them to telephone to the people that we bought the safe from to get the combination and they telephoned. I believe they sent over and got it and came back and opened the safe and got the books out.



By that time there was some judge had walked into the room—I think he was from Indiana; I think they called him judge; and Ernest Bodine and Dennis McNerney had gotten up there at that time. So they took all the books and everything that was in sight out of the safe and called a hack and sent them to Oklahoma Trust Company. I went with the books. Dennis McNerney and Ernest Bodine and myself went to Oklahoma Trust Company with the books and we turned them over to Mr. Jones, and he said it was the understanding that neither party should have access to them unless the other party was present or consented to it. I told him: "All right, sir," and I never showed up around the office after that.

In the account now shown me the name of the party to whom the payment was made is The Texas Company. Those payments were made to The Texas Company to cover the asphalt material used on the streets. The Texas Company had furnished all this money, and this money was checked out to pay for the different things that went into the work, and when The Texas Company was furnishing asphalt it was paid a check for that. Where the vouchers were payable to The Texas Company it was for material. They (McNerney) got asphalt from the Company, and sometimes maybe there would be some gasoline or lubricating oil for the plant, or something. Where the voucher is to J. A. Handy or H. Y. Newsum for expense or pay roll it means, for pay roll, that it was to pay the men off that were working on the streets and plant, and several vouchers to Handy or Newsum will be found there for sundry bills, which were little miscellaneous bills around town for office supplies and things like that, and I generally kept a little cash in the safe so I could pay those small bills when they were presented. During this time I was in the office The McNerney Company did not get any funds that I ever knew of from any other source to go into this work.

At the time I left I do not think there was a single street, as well as I recall right now, completed. There was a little patch in the curb and guttering—something the matter with it. There was no street that no work at all had been done on. In District 66, which was Fifteenth street, out on the hill, nothing further than the grading had been done, as well as I remember; I think they were just starting on the curb and guttering when I left. I do not recall the exact date that I left the office; it was either the fourth, fifth, or sixth, right along there, of December.

*Cross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

After the delivery of the books and papers to Oklahoma

Trust Company, as I have related, I never went back to Oklahoma Trust Company to get the books and papers. I never made demand of them to see the books and papers at any time after that.

I had general charge of the account and the paying out of the money to McNerney and The McNerney Company on these street improvement districts, and J. A. Handy was in charge of the construction work. I do not know when Mr. Handy took charge of the work; he was at Muskogee when I came. He was also an employee of The Texas Company before coming to Muskogee. I do not know where he is now, and do not know whether or not he is in the employ of The Texas Company at this time. I came to Muskogee from the Houston office. I drew a salary of \$125.00 while at Muskogee; before I came to Muskogee I drew a salary of \$125.00—\$125.00 and my expenses when I was away from the Houston office. While I was in the Houston office there was no expense added. I am now drawing a salary from The Texas Company of \$125.00. I do not know what salary Handy was drawing before he came to Muskogee. I suppose the salary that is charged up in the account against The McNerney Company for myself is what Mr. McNerney says; I do not know positively what it is. I do not know that it was charged up all the way through \$250 for myself and \$250 for Handy, a month. The Texas Company never did pay me \$250. \$125 a month was actually paid me while I was at Muskogee. It is not a fact that on February 1st I charged salary for Handy and Newsum for January \$375; nor on April 1st salary for Handy and myself for March \$500. I never received any such sum, so far as I am concerned. Mr. Handy was called superintendent of the work. I do not remember seeing notices that he had posted that all employees must report to him and obey his orders, or something of that kind; I cannot recall ever seeing notices at the plant and also in the office to that effect.

I kept an account called sundry cash, and out of it I paid small bills as they came in, such as laundry and telephone bills and small miscellaneous bills. The larger bills I paid by check and also took vouchers for them, and I also took a voucher for the sundry bills. The check was on The Texas Company's account in Oklahoma Trust Company. The small bills I paid by cash which I had drawn from The Texas Company's account in Oklahoma Trust Company. When I drew amounts out of the bank I gave my check on The Texas Company's account, signed by myself and countersigned by J. A. Handy.

As to whether when I came into the office there was not a system by which a voucher check was used that The Me-

Nerney Company was using on its account in Oklahoma Trust Company, I never saw any system when I got there. It was not suggested to me after I came that the payments be made by voucher check of that kind, countersigned or approved in some way by McNerney or some officer of The McNerney Company. They had some old vouchers, and that was a system I had never used, and I wanted to use the same system I had been using on other work with The Texas Company, and it was agreed, but so far as anybody approving anything, that was never mentioned. I did ask McNerney to O. K. a bill I paid. There were lots of things that came up that would have to have Mr. McNerney's approval before they would be paid, but on the other hand there were lots of things that I paid without McNerney's approval.

It is a fact that Mr. Handy and I both had a great deal to do in securing legislation down at the city hall, the proper resolutions looking to the issuance of bonds; we did go there meeting night and bring these matters up so they could be acted on. There were a few new contracts taken by The McNerney Company after I came in the office; as to whether there were five new ones, I do not remember the exact number now; there were several, though. Besides the contracts that were actually awarded to The McNerney Company, there were quite a number of other contracts let throughout the city for which bids were submitted by The McNerney Company, with the expectation, possibly, of getting the work, if the bid should happen to be low. Mr. P. J. McNerney usually made those bids. I think on several occasions he would figure it in lead pencil and there would be several of us fill it out in ink, and then he would sign it, and sometimes Mr. Handy would do that. We were all hustling around and trying to get additional contracts to those that we had at that time. It is not a fact that on some occasions Mr. McNerney was out of town and still bids were submitted there by the office—only the ones that he had left there to be submitted; in fact, I do not remember an instance when Mr. McNerney was out of town when a bid was submitted.

I was familiar with the talk about the office about these contracts that were coming up. Mr. Beaty was in charge of the work at that time. I and Mr. Handy both reported direct to Mr. Beaty. I kept Mr. Beaty advised on these matters. I made a daily report to The Texas Company or to Mr. Beaty, covering the work, for one thing, and the progress of it, showing the work done on each district. We did not report to Mr. Beaty the amount of money expended daily. Mr. Handy made out a statement showing what the work cost a yard every day, which statement included the material items, the items

for labor at the plant, and the item for labor on the streets—that is, the top gang. Mr. Handy's statement did not include the office expenses. The office expense was only sent in with the other statements showing what was paid during the month. I sent in addition to the daily report a monthly statement. I did not also send to Mr. Beaty duplicates of the vouchers issued; there were no duplicates issued. I did not take carbon copies of the vouchers. These copies I have here are copies of the originals, which copies were made afterwards, and were made after the books were all taken away from me in the office at Muskogee. The copies were made from the originals. The originals were then in Dallas. I had sent the originals to Mr. Beaty. I sent the originals to Mr. Beaty about once a month. At the time I left the office Mr. Beaty had the originals of every voucher I had taken, or else I shortly afterwards sent them to him; I think I had gotten those mailed to him the first three or four days in December. The copies which I present here today are copies which I made from the original papers in Dallas. When I stated I did not know where the originals were it was because the last time I saw them they were in charge of Mr. Beaty. As to whether the only items on the account not covered by vouchers are the salary items of myself and Handy, I started to check that over and got as far as March 1st. I cannot say that this particular account was prepared in Judge Beaty's office at the same time copies were made of the vouchers; I think some account was prepared there—the one used by him in filing this case. I did not have anything to do with putting into that account the salary items of Handy and myself; I do not know who put them in. I do not know anything about a charge in the account of March 1 of salary for Handy and myself for February, \$500.00, only as to that agreement, that letter that Mr. Mc Nerney wrote to Judge Beaty as to what our salaries would be, and what he recommended to him and would approve of. I did not see the bill containing an item of \$250 a month for myself and Handy's services; all I know was that it was agreed that we were to get that. On account of that letter we were expecting them to put \$250 in that account, but I do not know whether they put it in there or not.

There was not any charge that I heard in December that I had been guilty of embezzlement of some of the funds. He said he was going to have me arrested for embezzlement. That was not for something I had done in the past; there had never been anything said before that. They did not want the books so they could be put in safe-keeping so I could not alter them; they did not make any such statement. The judge there from Indiana was named Merrill Moores; I do not know whether it was under his instructions or not that the books

and papers were sent to Oklahoma Trust Company. He came in after all the talking and practically everything was over with; he came in after the safe was opened. He had been in the city for a day or two; I knew who he was, that he was a lawyer from Indianapolis. There was a good deal of hard words passed between me and the McNerneys at the time. I do not feel kindly towards them now, none in the world. I mean by that that I do not feel kindly towards any of them. I do not remember the exact date I had this agreement with them; it was something along about July; I do not remember whether it was July or August, 1909.

I had not had any trouble with the McNerneys before Mr. J. H. Huckleberry left me in July, 1909. I recollect that Mr. Huckleberry left in the early summer of 1909 and did not come back until October. I recollect matters of legislation Mr. Huckleberry talked over with me before he left. I cannot recollect that at that time I was in a kind of a row with the McNerneys; it was started along in the summer sometime. I know nothing about the same thing being true with Handy and McNerney; I cannot say I know it resulted in Handy's severing his connection with the work in October. I was there all the time. There seemed to be hard feelings in the way that Handy and McNerney were acting; of course, I do not know anything about Handy's personal business. I know that after Handy left the work was carried on under the supervision of McNerney on two streets up in the Boston Avenue and Denver Avenue end of town. I knew that prior to that time all the work had been done under the supervision of Handy, that Handy hired and discharged the men as he saw fit, that he had charge of the work of the subcontractors. I do not know that Handy made any subcontracts. As to my knowing that I at one time agreed with people about the price for removing the dirt on Fifteenth street, that was done from Mr. McNerney's telling me to do it. The name of the people I made that contract was Kinkade, Linzey. I do not recollect the exact date I made that contract; I do not recall the different prices I agreed to pay for the different classifications, just now. I think there was one subcontract that I negotiated with A. J. Bower; that was curb and gutter, and I do not know whether he had any base or not. I do not recall the date I made the subcontract with Bower; it was along in the summer, July or August, of 1909. I made a contract with McAlpin; that was about the same time, I think, or a little later on, possibly. McAlpin's contract was curb and gutter, only, I think, and I think East Okmulgee Avenue was one of the streets. Moore had one contract and he transferred it to McAlpin; I do not remember just exactly what streets it was we made the contract with him for. The Bower contract cov-

ered two streets as well as I remember, Twelfth and a little short street—Kendall Boulevard, District 33, I think it was. I did not sublet the grading in District 33; Mr. McNerney sublet it. Mr. Handy did not make a claim on any subcontractor that I know of.

Handy employed the plant foreman, who was named Kreiter; I think he was a brother-in-law of Handy—I do not know positively. I think he came from New Orleans to Muskogee. He had been with Handy formerly at New Orleans. As to whether Harry Gassoway was plant foreman before Kreiter was employed, that was before I came. I think Kreiter and I came about the same time; they were not working when I got to Muskogee. I know Kreiter supplanted Harry Gassoway as plant foreman. The stenographer I had at the time I quit was my brother. He came from Houston; I was paying him \$75.00 salary, I think. I did not buy all the stuff that was in the office. I bought the safe, and I think I bought the desk that Mr. McNerney used; I think that was all; I paid for them out of The Texas Company's funds and charged it in my account.

#### *Redirect Examination.*

I did not make any purchase or pay any bill that Mr. McNerney objected to, that I ever knew of. There were ten asphalt wagons purchased the same way. The Texas Company never got back the asphalt wagons and the safe and desk and things of that kind that their money paid for.

Mr. McNerney knew about the subcontracts that were let; he knew about every one. The price was talked over and it was under his instructions that I made them. That applies to all of them that I made.

There was an agreement that in case these contracts paid out I was to be paid a sum different from what The Texas Company was paying me. Mr. McNerney wrote a letter to Mr. A. L. Beaty, and after that letter there was an agreement between Mr. Beaty and Mr. Handy and me that we would get the salary stated in that letter. That salary was to be paid conditioned on the work paying out.

Mr. Handy severed his connection with the work some time before I did. I do not know, could not state positively, whether or not that was on account of friction between Handy and the McNerney people, but he did sever his connection with the work in October.

#### *Recross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

I had the talk with Judge Beaty right after the letter was written by McNerney; I do not remember just exactly the



date of the letter; it was a month or two after we had been at Muskogee. If the contract paid out we were to get the increase in our salaries as recommended by Mr. McNerney, and if they did not pay out we were to get the regular salary. I think that it was understood that applied to the contracts that they had. I suppose it would have applied to all of the contracts. There was not anything said about the future contracts; I did not understand it applied to future contracts; it was the ones we had then; I did not know that I did state to the contrary awhile ago. I started to tell that it included all the contracts that we had then; I do not recollect my statement just now. It applied to the contracts that they had that we were working on, is the way I understood it, while we were at Muskogee. I suppose any other contracts would have been taken into consideration in the end. I do not know how long the work at Muskogee was to last. There was a chance for it to last two or three years, with the amount of work at Muskogee.

*Cross Examination on Behalf of Oklahoma Trust Company.*

I have not had any other arrangement with reference to additional pay since this litigation was begun. My understanding of the arrangement is that I am to get the salary recommended by Mr. McNerney for the time I worked at Muskogee, provided there is money enough to pay it out of all these contracts. There was nothing stipulated as to any particular contract. It is my understanding now that I am to get no additional pay over and above the \$125 a month unless all these contracts that I have testified about pay out in full.

*Cross Examination on Behalf of P. J. McNerney and the McNerney Co.*

There were four or five, possibly six, contracts taken after I came to Muskogee. This agreement in regard to the additional salary I would receive was made before the additional contracts with the city were entered into. It was made shortly after we came to Muskogee, something like two or three months after. At the time these contracts were taken I had a personal interest in them to the extent of the difference between my \$125 a month and what I was to get. In case they paid out I was to get the extra salary. I had a personal interest in the success of these contracts, certainly. I wanted to see them pay out whether I got an increase or not. My increase in salary depended on that. This was not offered to me by The Texas Company as a sort of bonus to sort of help push this work along. It was not a free will offering from The Texas Company. Mr. McNerney brought the subject up first. It was not the understanding that we

were to get it as a free will offering from Mr. McNerney. He made the proposition that our salaries were to go in at once. Mr. McNerney made the proposition that The Texas Company was to pay me and Handy \$500 a month, and The Texas Company did not accept his proposition, and never paid us \$500 a month. The Texas Company paid me \$125 a month, and I think it paid Handy \$175—the two of us \$300. The Texas Company did not accept that proposition of McNerney in regard to the wages, only to hold it to the end. I had no interest whatever in the contracts on Districts 15 A, 15 B, 66, 64 and 45, which were entered into with the city and The McNerney Company after I came to Muskogee. The contracts were made between the city and The McNerney Company. I do not know that I had anything to do with the obtaining of those contracts, only to help them in the office. I was working for The Texas Company all this time. When I was helping McNerney make out these bids I was working for The Texas Company; I only made them out because he asked me to. As to what they based the figures on in these bids, I never saw Mr. McNerney figure it out and do not know how he based it; he always had the figures made out. Mr. McNerney and Mr. Handy did not consult in regard to these things, that I can recall right now; I do not know whether they did or not.

*Redirect Examination.*

In the statement made in the bill of complaint all the items were actually paid and went into the work outside of the items for salary for Handy and Newsum.

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Also J. H. HUCKLEBERRY, a witness introduced by the complainant, testified as follows:

I was one of the incorporators of The McNerney Company and also of Oklahoma Trust Company. Oklahoma Trust Company was incorporated about May or June, 1907, as I remember. I have not thought of who were the original directors of Oklahoma Trust Company and counsel will have to let me think a little bit: R. S. Litchfield, F. S. Sawyer, A. T. Alison, J. B. Jones, J. A. Paulhamus, J. H. Huckleberry—I think there were seven at first and they were afterwards increased to nine. I expect W. H. Rosier was one of the first. When it was increased to nine W. H. Rosier and W. G. Sawyer, of Nowata, made the nine. Wait a minute. The nine were R. S. Litchfield, F. S. Sawyer, A. T. Alison, J. B. Jones, J. A. Paulhamus, J. H. Huckleberry, W. H. Rosier, T. H. Owen, and W. G. Sawyer. The nine that I have just mentioned were the directors in January, 1909.

Let me figure just a minute on who were the first directors of The McNerney Company. I am not certain as to whether the directors of The McNerney Company are three or five. P. J. McNerney was one of the directors, T. H. Owen was a director, J. H. Huckleberry was a director; I think C. H. Shaw was a director, and also J. C. Stone, or some one else; I have not refreshed my recollection on that.

J. B. Jones was the first president of Oklahoma Trust Company, and he was president of it in the first part of January, 1910, and resigned during the month of January, 1910. He was the president during the interval between the organization and the time he resigned. It is difficult to answer as to who was the first man of authority in the business of Oklahoma Trust Company except in this way: The management was lodged in the board of directors with the executive officers, president, vice-president, secretary and a treasurer and a cashier. In running the business of the company I presume Jones was the executive. He was the head man. He was an active president, with the exception that he was away a good part of the time, say a few days or a few weeks at a time. He would be away sometimes in the interest of the company, and sometimes on his personal matters. When Mr. Jones was at Muskogee he was the head man in charge, running the business, under the board of directors' control. I think that (meaning the control of the board of directors) was truer in this corporation than it is in the usual corporation. I have not a copy of the by-laws with me, but I have them in the office. Mr. Alison was cashier; Mr. Paulhamus was secretary. I think Mr. Paulhamus resigned as secretary sometime in the spring of 1910, and Mr. Alison went out as cashier in probably May of 1909. Mr. Alison did not sign the second contract. At the time he signed the first contract, January 5, 1909, he signed it as cashier of Oklahoma Trust Company.

Oklahoma Trust Company held notes against P. J. McNerney and The McNerney Company, quite a batch of them. The total amount of said notes on December 1, 1909, was approximately \$85,000 to \$90,000. Those notes were given for moneys advanced to McNerney and The McNerney Company. It was all for money advanced to McNerney and The McNerney Company. As to knowing of my own knowledge that the money was advanced, I cannot say that I have personal knowledge, that is, absolute knowledge, as to every transaction. Generally, though, I have personal knowledge, and I have no reason to doubt but what all the money was actually advanced. Some of the money that was included in that \$90,000 was used by McNerney individually. There was

a large portion of it used really in promotion expenses, etc., in the fall of 1908, when there was a conflict in regard to the paving and the letting of the contracts, and various litigation, in September, in the fall of 1908. I considered a great deal of it wasted. Some of the money was used in promotion of paving contracts in other cities. I do not think that the books of the bank will show that the transaction in Lawton was included in this amount. Some of it was used after McNerney had an arrangement with The Texas Company; most of it I think was used before he had an arrangement with The Texas Company. McNerney used some of it at Bartlesville, some at McAlester, some at Shawnee, some at Oklahoma City, probably some of it at Lawton and one or two other places down in that country. Most of it was used in Muskogee. McNerney bought a newspaper with it, I think, when there was a fight on a contract, and lost considerable money in that.

The general nature of the expenditures at these other places was in promoting Texico asphalt. There were no expenditures whatever, so far as I know, before McNerney's agreement with The Texas Company. I thought counsel was meaning the date of the contracts in question; that is the date I mean, and my testimony was given believing that was what counsel for complainant meant. So far as I know McNerney was not indebted in any sum to Oklahoma Trust Company at the time he made his first arrangement with The Texas Company to promote Texico asphalt.

I would judge the greater portion of this \$90,000 went into paving. I do not know that there is not over \$22,000 in paving. I am willing to state my belief that there was no juggling of any kind between McNerney and Jones of their paper, and I have no reason to believe that there was, and I do not believe it would have been possible to have been pulled off without my knowledge. I do not know what the actual amount that went into this paving was. I do not know what the approximate amount of that indebtedness was along in January, 1909, at the time this paving contract was made; that would be a guess, absolutely.

These notes which I say aggregated \$90,000 were turned over to me for collection about the 20th of December, 1909, maybe a little later than that—before Christmas, 1909. I took most of said notes with me to Indianapolis, Indiana. I was away from home about ten days in the early part of December—made a trip to Colorado—and I came home, I think perhaps the day that complainant's injunction proceedings were sued out. I was not here on December 13th, and knew nothing about the transaction, and I came home perhaps

the 17th or 18th, and the notes were turned over to me with instructions to collect them. They were turned over to me by somebody in the bank—I presume it was Jones. I had a talk with Jones. He told me to go and collect the notes, and I went to Indianapolis. I saw Merrill Moores while I was at Indianapolis. At that time some of the bonds had been expressed to Spitzer & Company for sale, and others were in the hands of Mr. Moores. I brought some of the notes back with me, but not all of them. I got home either about the 28th or 29th of December: I was gone on that trip a week, perhaps a little more, all together. I did not make any collections at all on that trip. I could not give counsel which notes and the amount thereof that I brought back with me; I have no memorandum to check that. The greater number in amount sent to Merrill Walker, a lawyer of Indianapolis, with instructions to make the collection and deposit any collections he might make in Hamilton National Bank at Chicago, and the rest of the notes I brought back. I think I had \$46,000 to \$60,000 worth of notes. I did not see Walker, I knew him personally. He was a classmate of mine in college and also in law school. Walker was not a classmate of Merrill Moores. I know that Walker and Merrill Moores were acquainted with each other; they were both lawyers in Indianapolis, and I know that they have had an acquaintance since 1890, some place along there. I wrote Walker only a very brief letter about how to make the collection, telling him that I had reason to believe there were funds in the hands of Moores and I wanted him to proceed by collection or attachment or any way necessary to enforce collection. That was not what I wrote Walker after I came home. I wrote him that before I got home. I wrote him on the train, sending the notes to him. I do not know where the letter was mailed.

After that some of those notes were collected. I turned some of them over to McNerney's attorneys in Kansas City about January 21 or 22, 1910. I did not get any proceeds from Walker, but after I got home I received word from Walker that he had collected and forwarded to Hamilton National Bank \$21,252.40. My information is that amount was actually passed to the credit of Oklahoma Trust Company with Hamilton National Bank. It was passed to Oklahoma Trust Company on December 31st, 1909. The books of Oklahoma Trust Company show that, and I think probably the advices from Hamilton National Bank have that day. That was the date and that was the amount. That was the collection made by Walker.

The total amount collected by Merrill Moores from the sale of the bonds that went into his hands was two items;

\$21,488.20 and \$41,629.65. The last collection was made some time in January, the fifth or sixth, 1910. That was made by Merrill Moores from the sale of those bonds to Spitzer & Company. The previous collection, about December 28, 1909, of \$21,488.20, was from another sale of the same bonds. Both of these collections, a total of \$63,117.85, were from a sale of these bonds that were delivered by the City of Muskogee on the 13th of December, 1909. Merrill Moores turned over to Walker the amount that Walker sent to Hamilton National Bank of Chicago. I do not know what was done by Moores with the balance of the money. I can now account for \$40,000 of it.

On January 21, 1910, Mr. Horace Speed of Guthrie, one of the previous counsellors in this case, paid to Commerce Trust Company of Kansas City, Missouri, \$20,000 to be credited on the bills payable due from Oklahoma Trust Company to Commerce Trust Company. This payment was not in currency, but in a bill of exchange drawn by a bank of Indianapolis, Indiana, and payable to Horace Speed's order. Mr. Speed at the same time had another bill of exchange from the same bank for \$20,000 more, a portion of which was placed to the credit of P. J. McNerney in Commerce Trust Company, and a portion of which was placed to the credit of Alamo State Bank in Commerce Trust Company. After this P. J. McNerney gave a check to Alamo State Bank for the sum placed to his credit, the Alamo passing it back on a note held by it on McNerney. This made the total of \$20,000, which I am now informed was a portion of the proceeds received by Moores from sale of the bonds on January 5th or 6th to Spitzer & Company.

I am not certain about whether this payment that Speed made at Kansas City was to take up some of McNerney's notes that had been put there by Oklahoma Trust Company as collateral to secure its indebtedness to Commerce Trust Company; I would have to refresh my recollection on that; I am not clear about it. But \$20,000 did go as a direct application on Oklahoma Trust Company's indebtedness to Commerce Trust Company, and the other \$20,000 found its way, as I have stated, to Alamo State Bank and was accepted by it on the notes of McNerney which it held. I think that dragged along for longer than a week after the date I saw Horace Speed in Kansas City; it seems to me it was nearly thirty days; it was not over thirty days.

With regard to when the notes that McNerney had given to Oklahoma Trust Company were cancelled, I understand that Mr. Walker delivered some of the notes to Moores, representing the payment of \$21,000. Then when in Kansas City



I gave an order to Mr. Walker to turn over the other notes to Mr. Moores, and the notes I had there I delivered to Mr. McNerney. Mr. Speed was the attorney. All the notes, though, that Oklahoma Trust Company held against McNerney were cancelled as I have above stated, that is, paid as above stated. I do not think the notes were ever paid out of these funds that came in the way I have mentioned. I understand there was a credit balance to The McNerney Company carried on Oklahoma Trust Company's books after that. I am not positive, but my information and belief are that that credit balance was represented by an old item which was no part of this, and was made up by advances by way of certified checks that afterwards came back.

McNerney was in Kansas City when that deal was closed there. He was in the bank part of the time; whether he was in the bank when the payment was made I am not sure. He was in Kansas City when the payment was made and he was in the bank part of the time while we were negotiating, and part of the time he was not. The transaction took quite a while; Mr. Speed was there, and we were in and out. It was all transacted during one day. Some of the notes I did not have with me at Kansas City were represented, as I now remember, by notes which the Alamo had, which were delivered to the Alamo by McNerney on the receipt by him of this check. J. B. Jones was in Kansas City that day and was present while this business was transacted.

There was a payment made to The Texas Company September 25, 1909, of \$27,906.50. A payment of that size was made on that date, under certain arrangements. That was money realized from the sale of bonds on Districts 17 and 29, I believe, an item which was in dispute between the McNerneys, Oklahoma Trust Company and The Texas Company; the McNerneys claiming they were entitled to have it credited on their indebtedness to Oklahoma Trust Company; The Texas Company claiming that Oklahoma Trust Company should pay direct to The Texas Company; and Oklahoma Trust Company claiming that it should be credited on The McNerney Company's indebtedness. This item was paid to The Texas Company with the understanding that it did not prejudice the rights of any claimant thereto; that the matter should be allowed to remain in *statu quo*. This \$27,906.50 represented the net proceeds after all fees had been taken off. As a matter of fact, Oklahoma Trust Company sold those bonds at ninety-one and got one per cent commission, and it also paid the engineering fees that were due the city, and this was the net balance.

All the bonds that were delivered on the 24th of November were sold by Oklahoma Trust Company to Spitzer & Company, Toledo, Ohio. At the same time the bonds in districts 17 and 29 were delivered to Oklahoma Trust Company bonds were also delivered to it on districts 26 and 27, and over those bonds the same controversy arose between The Texas Company, Oklahoma Trust Company and the McNerneys. When these bonds were offered for sale to Spitzer & Company it appeared that they had been illegally issued, and they were returned and cancelled and new bonds were issued in place thereof, which new bonds were sold by Oklahoma Trust Company to Spitzer & Company. The proceeds thereof were held by Oklahoma Trust Company and carried on the books in the name of Oklahoma Trust Company, trustee, and out of this fund were paid various sums of money to McNerney & Company to carry on the work of paving at that time, The Texas Company not then making any advances. The amount was \$34,997.50 and the net was \$24,884.46, according to the books of Oklahoma Trust Company, and that was after certain payments had been made to McNerney to enable him to carry on the paving work, and after the commission of one per cent and also the engineering fee had been taken off. The engineering fees were the engineering fees that were actually paid out to the city by Oklahoma Trust Company.

When the proceeds of the first bonds came in there was some controversy over them, Oklahoma Trust Company claiming that it was entitled to apply them on indebtedness it held against McNerney, McNerney insisting that they should be so applied, and The Texas Company claiming that it was entitled to the money. That controversy was patched up temporarily by the money being turned over to The Texas Company, with the express understanding that the act of turning it over should be without prejudice to the rights of any party. When the next installment of bonds was sold and the proceeds came in there was the same kind of controversy. It was the re-issue of the same bunch of bonds that was mixed up in the first controversy. It was the re-issue that was delivered on the 24th of November, and not the original issue. They were turned over by the city on the 24th of November.

Oklahoma Trust Company is in existence now. It is really not transacting any business. It directed a sale of the stock which it owned in Canadian Valley Building Company, in January, 1910, I think. The transaction appears on the minutes and gives the amount. When I came home from Indianapolis there was a deal on between Oklahoma Trust Company and Alamo State Bank, which was finally closed January 3, 1910. The substance of said deal is included in a

written instrument which I can give counsel for complainant. Alamo State Bank assumed certain deposits of Oklahoma Trust Company, and to secure it for the assuming of this indebtedness it received as a pledge all the assets of Oklahoma Trust Company, or practically all the assets. I have not a copy of said contract here; I have one in the office. I can and will, if there is no objection, give the notary a copy and let him copy it.

The following is a copy of said contract between Alamo State Bank and Oklahoma Trust Company:

*"This Agreement, Made and entered into this 3rd day of January, A. D. 1910, by and between Alamo State Bank of Muskogee, Oklahoma, party of the first part, hereinafter called the bank, and Oklahoma Trust Company, of Muskogee, Oklahoma, party of the second part, hereinafter called the trust company, Witnesseth:*

*"That, whereas, the bank desires to purchase, and the trust company desires to sell its banking business,*

*"Now, therefore, For and in consideration of the sum of One Dollar (\$1.00) each to the other paid, receipt of which is hereby acknowledged, and the covenants and agreements hereinafter mentioned and set forth to be done and performed by each of the parties hereto, as herein set forth, the bank hereby assumes and agrees to pay the depositors of the trust company the following amounts, to-wit:*

<i>"Deposits of Individuals.....</i>	<i>\$216,991.66</i>
<i>Deposits of Banks .....</i>	<i>191,915.28</i>
<i>Time Certificates of Deposit .....</i>	<i>81,560.87</i>
<i>Demand Certificates of Deposit.....</i>	<i>65,250.00</i>
<i>Cashiers Checks .....</i>	<i>146.97</i>
<i>Money Orders .....</i>	<i>3,830.00"</i>

a total of \$560,979.90, less deposits set forth and shown in Schedule A hereto attached and made a part hereof.

*"The trust company hereby sells and delivers to the bank its assets, as set forth and shown in Schedule 'B' hereto attached and made a part hereof.*

*"The trust company represents that a portion of its assets set forth in Schedule 'B' is now held by the Hamilton National Bank of Chicago, Illinois, as collateral to secure the payment of the trust company's certificate of deposit for the sum of \$50,000.00, owned by said Hamilton National Bank, and said collateral is hereby assigned to the bank for the purposes herein set forth.*

"The trust company further represents that a portion of its assets set forth in Schedule 'B' is now held by the Commerce Trust Company, of Kansas City, Missouri, as collateral to secure the payment for an indebtedness of \$40,000.00 due by the trust company to the Commerce Trust Company; that the trust company hereby agrees to pay said \$40,000.00, and to deliver to the bank such portion of its said assets as are set forth in Schedule 'B'; that same are hereby assigned to the bank.

"It is further agreed that the sales, transfers, deliveries herein provided for shall take place on January 3rd, 1910; that the trust company's assets set forth in Schedule 'B' shall then be turned over and delivered to the bank; that for the purpose of permitting the selection by the bank of the bills discounted of the trust company, to the amount set forth in Schedule 'B', it is agreed that all of the bills discounted of said trust company shall be delivered to the bank; that the bank shall, within sixty days from this date, select bills discounted to the amount of \$336,862.13 as set forth in Schedule 'B', the same to be valued at present worth of same on January 1st, 1910; that the bills discounted so selected shall be retained in the bank and be the property of the bank; the bank is further authorized to retain and collect all bills discounted, apply the proceeds in payment of bills discounted selected, and to retain the balance as collateral security to guarantee the payment, as hereinafter set forth, of the bills discounted selected by said bank.

"The trust company hereby guarantees the payment of each of its notes or bills discounted selected by the bank, as hereinbefore provided for, together with the interest thereon; that this guaranty extends to and covers all extensions or renewals of any notes or part thereof made upon request of the trust company.

"The bank further agrees, upon request of the trust company, to extend any of said notes for a term or terms not exceeding, in the aggregate, six months, at a rate of interest to be fixed by the bank not exceeding eight per cent per annum; that the trust company hereby guarantees the correctness of all of its accounts.

"The trust company further agrees to sell and deliver to the bank the fixtures of the trust company now in its banking room, for the sum of \$7507.40; and that the bank may select said fixtures at said price in place of a like amount of bills discounted or notes of the trust company, as set forth in Schedule 'B', the bank to have the right to purchase said fixtures for a period of ten days. The trust company further

agrees that in the event said bank purchases said fixtures that it will, upon the demand of the bank made at said time, cause the Canadian Valley Building Company to execute a lease on the south half of the first floor of its building to the bank, for a term of five years, at a fixed rental of \$250.00 per month, the bank to have the privilege of renewing said lease for a further term of five years at the same rental; said lease further providing for a further renewal by the bank for a period of five years upon a rental value to be adjusted in accordance with the increase in valuation of said premises.

*"In witness whereof,* the parties have hereunto caused their corporate names to be attached by their officers, properly thereunto directed by the board of directors of each of said companies, and attested by the seal of each of said companies.

"ALAMO STATE BANK,

"Attest:

By.....

"OKLAHOMA TRUST COMPANY,

"Attest:

By.....

"SCHEDULE 'A.'

"Being a list of the deposits of the Oklahoma Trust Company not assumed by the Alamo State Bank:

Mid-Continent Life Insurance Co.....	\$19,816.16
Commerce Trust Company Collection Account...	271.66
The McNerney Company, Special Account.....	2,548.60
Oklahoma Trust Company, Trustee Account....	25,351.63
J. A. Paulhamus, Special Account.....	4,700.00
C. H. Shaw.....	82.91
I. N. Putnam.....	2,420.00
J. B. Jones, Special Account.....	900.00
Night & Day Bank Account.....	56,303.57

Total of .....\$112,394.53"

"SCHEDULE 'B.'

"Being a statement of the assets of the Oklahoma Trust Company sold and delivered to the Alamo State Bank:

Cash .....	\$12,806.69
Sight Exchange, following banks:	
Hamilton National Bank, Chicago.....	37,785.17
Commerce Trust Company, Kansas City.....	10,542.40
Gate City National Bank, Kansas City.....	752.83
First National Bank, Muskogee.....	1,901.22
National Park Bank, New York City.....	6,223.70
Central National Bank, St. Louis.....	1,960.58
First National Bank, Tulsa.....	187.05

Sundry Banks, Collection Account.....	7,840.36
Bonds & Warrants.....	13,483.96
Memorandum of Indebtedness of Mid-Continent Life Insurance Company.....	18,239.28
Bills Discounted of Oklahoma Trust Company to be Selected as Set Forth in Accompanying In- strument, to the Amount of.....	336,862.13
Total Assets .....	<u>\$448,585.37"</u>

The contract between Alamo State Bank and Oklahoma Trust Company is dated January 3, 1910. I have a memorandum of the amount on deposit with Oklahoma Trust Company at that time, approximately. I should judge it was about five hundred thousand dollars, in round numbers. Alamo State Bank assumed the payment of only a certain class of depositors; a certain class was not assumed. It assumed the payment of all depositors except what is called Schedule "A," being certain specific items. I do not know what the amount it did not assume aggregated in round numbers; they are set out in the contract. Under this contract no debts other than depositors were assumed. There was an item assumed in the Hamilton National Bank, which might be called debt, but it was secured by collateral. All that I have mentioned that was assumed aggregated about \$500,000, and there were certain deposits that were not assumed. Parties situated like The Texas Company or The Texas Company's assignee were not provided for. At face value Oklahoma Trust Company turned over to Alamo State Bank something like \$200,000 assets above the debts assumed by Alamo State Bank. Some of these assets have been realized on and some have not. The result was such as to establish the insolvency of Oklahoma Trust Company at that time; that it established the fact that it was insolvent at that time is a conclusion that I would now draw.

Alamo State Bank was taken in charge by the bank commissioner and the banking board in the State of Oklahoma in August, 1910, and the assets of the Alamo were sold to Union State Bank, Union State Bank assuming the liabilities to the depositors. The banking board took over Alamo State Bank because it was insolvent. It was in August of the same year, 1910, that it went into the hands of the bank commissioner and banking board. I am not sure that the date was August 28th. It was after this motion was filed against it.

The last installment of bonds was sold to Spitzer & Company for ninety cents on the dollar. Spitzer paid ninety-one for the other installments—that is, paid ninety plus one which was commission.

The McNerney Company is insolvent.



Oklahoma Trust Company was not in the banking business as a state bank, as well as in the trust company business. That could be answered in both ways. It was organized under the trust company laws, but was carrying on, under the power granted it by the charter, a banking business. It was under the law of the state by which deposits were guaranteed and it advertised that fact.

I have a record of the transaction by which Oklahoma Trust Company disposed of some of its other assets. The assets I am now referring to were not transferred to Alamo State Bank. Those assets were certain shares of the capital stock of Canadian Valley Building Company, a corporation. Oklahoma Trust Company was really the owner of all the capital stock of Canadian Valley Building Company that was issued, although some of it was carried in the name of individuals; that is, we qualified them as directors. The total capital stock of Canadian Valley Building Company was \$80,000, but not all issued; about \$60,000 was issued. The minutes correctly state the transaction by which they were disposed of. I could not tell who finally acquired said shares under that action. Oklahoma Trust Company delivered them to Mr. Jones and his associates, and the stock was then afterwards re-issued to a man by the name of H. B. Smith and some others. The Mid-Continent Life did not get a share of said stock. I have a record of some negotiations with the Mid-Continent Life in our minutes; said negotiations were carried out. The Mid-Continent acquired, first by option and then by purchase, the fee-simple title to the building. The minutes I am referring to are the minutes of Oklahoma Trust Company.

I do not know what amount of Oklahoma Trust Company Mr. Jones owned in January, 1909. I do not know what amount he owned when he originally came in; I only have information that he owned \$20,000.00. I do not know what amount he owned when Oklahoma Trust Company finally went out. My information is that his stock was paid up. I think Jones owned more than \$20,000 at the close. It is a fact that he had acquired quite a lot of stock after the concern got involved; he had taken over quite a little from other people that were in, that unloaded on him; I think it was approximately \$90,000 that he either owned or owed for. That had continued, prior to January, 1910, since the failure of Columbia Bank & Trust Company, I think, which was about September, 1909, perhaps prior to that.

*Cross Examination on Behalf of P. J. McNerney and The McNerney Co.*

I have testified in substance that the money received by Merrill Moores from the sale of the bonds which were delivered on December 13th was later applied upon the notes held by Oklahoma Trust Company against The McNerney Company. As to whether the agreement that it should be applied that way was prior or subsequent to the date of the delivery of those bonds, December 13th, as heretofore stated, I was not present in August at the time of the delivery of the bonds, and I state only from information now that proceeds were applied as stated. In the early part of 1909 I was assisting The McNerney Company in securing the proper legislation by the city council looking to the issuance of bonds. In the early part of July, 1909, I left the State of Oklahoma on a vacation, leaving those matters principally in the hands of Mr. Newsum. I returned to the state about September 18, 1909. I then learned of the transaction of August about which counsel inquires, and about the controversy that arose then between The Texas Company, The McNerney and Oklahoma Trust Company. As I then understood the matter, differences had arisen between The McNerney Company and The Texas Company, and The McNerney Company took advantage of the proposition that the bond resolution required the issuance and delivery of the bonds to McNerney and to The McNerney Company, and forced Oklahoma Trust Company to enter into a written agreement, which is in the pleadings, and to hold under the terms of that written agreement the proceeds of the bonds which were delivered at that time, and the trustee company was still holding those funds at the time I returned to the state. We then began a negotiation which ended in the payment of same to The Texas Company as heretofore stated. The controversy remained open, however, and has not yet been settled.

I have testified that a certain portion of the indebtedness of The McNerney Company and P. J. McNerney to Oklahoma Trust Company was incurred in promoting paving work in the towns of Shawnee, McAlester, Oklahoma City, Bartlesville and other places. I can state what class of pavement was being promoted in those different towns. It was the Texico Asphalt Paving cement for the purpose of laying sheet asphalt pavement. This was in compliance with McNerney's contract with The Texas Company.

I have spoken of Mr. McNerney's having bought a newspaper. That newspaper was in Muskogee. The occasion of his having to buy that was, it was at a time when the question was before the council as to whether the contract would be

let to McNerney or some other party, there being at that time a bitter fight made against Texico as a proper paving material, and this paper we understood was to come out with some statements derogatory to Texico which we thought would have a bad effect on the council or members thereof. This newspaper episode came up just before the contracts which are involved in this suit were finally let to McNerney, and it was to help secure the contracts which are the basis of this suit that this expenditure was made.

*Redirect Examination.*

I never heard that the article that was about to come out was more derogatory to McNerney's personal character than to Texico. I did not see the article that they had set up. It was a statement that was made to me at that time, what somebody else told me. So McNerney bought a newspaper. I do not remember what was the name of the paper. It was not an established paper; I do not know where it came from. I am not testifying that McNerney took that up for The Texas Company and that it approved anything of that kind; I do not know whether that is claimed in the answer or not. I never took it up with any member of The Texas Company and I do not know that McNerney did; I was not present when he did.

As heretofore stated, I was not present in Oklahoma until about December 17th or 18th, 1909, when this matter of the transaction of December 13th was brought to my notice at a meeting of the board, and a statement made to the board by Mr. Jones, the record of which I have here and offer to council for complainant. The substance of the statement made by Mr. Jones was that the bonds had been delivered to Mr. Wheeler and had been taken by Mr. Wheeler to St. Louis and delivered to Mr. Moores. In addition to that the statement was made that Mr. McNerney had consummated the sale of some land he owned, and Mr. Moores was to have the proceeds or security for these lands, and the notes were turned over to me with instructions to go to Indianapolis and make collection of any funds that I could find available, or any that I could make the collection. The collection was made, as I have heretofore stated, through Mr. Walker, and the money deposited in Hamilton National Bank. This money was received there about December 31st. I got information of it perhaps the day after I reached home. At that time the bank commissioner and the state examiner were at Muskogee and had been for several days past, and negotiations were on foot with the Alamo looking towards the sale of the banking business. I had no information from Mr. Walker or any one else that the money which was deposited in Ham-

ilton National Bank was from the proceeds of these bonds. In the hurry of the transfer the matter was not given much thought by myself, or, I suppose, by anybody else, but the deal was immediately closed with Alamo State Bank, and some thirty thousand dollars which was in Hamilton National Bank was passed to the Alamo, and, while the banking officers were in charge of Oklahoma Trust Company, in the sense that they had taken charge under the law, the matter was passed through without any thought on my part of any of the officers of Oklahoma Trust Company violating any injunction order of the court.

In regard to the transaction at Kansas City, January 21, the same statement is also true as to my knowledge. At that time I did not know that Mr. Moores had sold other bonds, or positively that the proceeds thereof had been placed in the bank at Indianapolis and the bank afterwards gave its draft to Mr. Speed. I did not see Mr. Moores from about December 26th or 27th until the arguments of the demurrer in this case; I do not know when that was.

As it transpired since, the \$37,000 that was passed to the credit of Alamo State Bank in Hamilton National Bank of Chicago included the \$21,000 from Walker that got into the Hamilton December 31st, and then the matter dragged for a day to get the papers signed up and get the consent of everybody to the contract. We had a meeting on December 30, and another on January 1, and then came Sunday, so that the papers were not ratified until January 3, although the transaction was about the thirtieth. It transpires now that \$20,000 did include the money put in Hamilton National Bank by Walker.

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Also B. B. WHEELER, a witness introduced by the complainant, testified as follows:

I got the bonds that were delivered on the night of the 13th of December, 1909. I had a talk with Mr. Jones after I got them. I took the bonds to St. Louis; I left on the train that leaves between nine and ten o'clock at night, and I got to St. Louis the next evening about seven thirty. I met some one there; it was Merrill Moores. I met Moores at the Union Station. I turned the bonds over to Merrill Moores, approximately a little over \$79,000 in amount. It was the installment of bonds on different districts mentioned in the bill of complaint as having been delivered on the 13th of December. Mr. Jones knew that I was going away on the train that night and take those bonds. I had a talk with him about it. That talk was down on the street just after I left the city hall. Jones agreed that I should take them.

*Cross Examination on Behalf of J. H. Huckleberry and J. B. Jones.*

Mr. Jones told me that he would like to have those bonds taken and placed in safe keeping some place out of Muskogee. Merrill Moores was an attorney of Indianapolis, Indiana—a practicing lawyer; I knew him before that time; I had met him; he was at Muskogee and was one of the solicitors in this case originally, representing McNerney and The McNerney Company.

The bonds were delivered to me at the mayor's office, by the consent of the mayor. I mean by that that the mayor refused at first to deliver the bonds to me and would not deliver them to me until Mr. Jones came down and checked them over, and after Mr. Jones came in the mayor handed them across the table to the city clerk and Mr. Jones, who checked them, and then the bonds were rolled up in a roll and passed back across the table to the mayor, and they were lying there in front of the mayor, and I asked him if that was satisfactory to him, and he said it was, and I picked up the bonds and walked out. At that time I was representing Mr. McNerney and The McNerney Company. I never at any time represented Oklahoma Trust Company or Mr. Jones. I did not represent at that time to the mayor or anybody else that I was representing Oklahoma Trust Company. When I was seeking to get the bonds that evening before Mr. Jones came I was not seeking to get them for Mr. Jones or Oklahoma Trust Company. I was there representing Mr. McNerney and The McNerney Company, and if the bonds had been delivered to me I proposed to turn them over to Mr. McNerney or do whatever he asked me to do with them. If directed to do so by Mr. McNerney I would have turned them over to Oklahoma Trust Company; I did not have any instructions at that time to turn them over to Mr. Jones. There was not any controversy at that time between McNerney and The McNerney Company and Oklahoma Trust Company, that I know of, except that before this time The McNerney Company and McNerney had insisted that the bonds delivered be applied upon the indebtedness of The McNerney Company and McNerney held by Oklahoma Trust Company, or the indebtedness to Oklahoma Trust Company. It was my understanding that these bonds were to be turned over to Oklahoma Trust Company under the agreement of August 16th and applied on the indebtedness of The McNerney Company; I would not have delivered them to Oklahoma Trust Company unless directed by Mr. McNerney. There was an actual controversy between McNerney, Oklahoma Trust Company and myself in regard to the application of the bonds which were due

upon paying contracts in controversy; it was not a sham controversy. Mr. Moores, to whom I delivered the bonds, had been counsel for Mr. McNerney and The McNerney Company previous to that, and still is, so far as I know.

*Redirect Examination.*

I mean to say that the agreement that the proceeds of the bonds or funds should be applied on the indebtedness of Oklahoma Trust Company was between McNerney and The McNerney Company. I have rather an idea that Farish's attorney objected to an agreement of that kind. Farish never agreed to it at any time to my knowledge.

*Recross Examination on Behalf of J. H. Huckleberry and J. B. Jones*

When I referred to the agreement between Oklahoma Trust Company and The McNerney Company, that was part of the written agreement of August 16, 1909.

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Also complainant introduced in evidence the following letters and telegrams:

Telegram from Merrill Moores, Indianapolis, Indiana, December 18, 1909, to J. B. Jones, Oklahoma Trust Company, Muskogee, Oklahoma: "Spitzer takes thirty-three. You get draft. Send me copy of bill for injunction immediately. It looks easy to meet." Received at Muskogee 9:25 p. m.

Telegram signed "J. B. Jones, president," dated Muskogee, Oklahoma, December 18, 1909, to Spitzer & Company, Toledo, Ohio: "Deliver to Mr. Moores of Indianapolis draft payable to Oklahoma Trust Company at ninety and accrued interest on delivery by Moores of District thirty-three Muskogee street improvement bonds."

Telegram from Spitzer & Company, dated Toledo, Ohio, December 18, 1909, to Oklahoma Trust Company, Muskogee, Oklahoma: "Forward District Thirty-three bonds attached to your draft."

Telegram signed "J. B. Jones, President," dated Muskogee, Oklahoma, January 13, 1910, to Hon. Merrill Moores, Indianapolis, Indiana: "You must arrange to come here very soon. Cannot delay much longer. Why have we not advice of credit in Chicago for Alamo State Bank? Answer."

Telegram from A. L. Beaty, dated Dallas, Texas, July 29, 1909, to Oklahoma Trust Company, Muskogee, Oklahoma: "When will paving bonds for C Street and Elgin Avenue be issued? Answer."



Telegram from Oklahoma Trust Co., dated Muskogee, Oklahoma, July 29, 1909, to A. L. Beaty, Dallas, Texas: "Understand bonds are being printed and about to be delivered."

Letter, signed "J. B. Jones, Pt.," dated Muskogee, Oklahoma, August 12, 1909, to A. L. Beaty, Esq., Attorney, Dallas, Texas:

"Replying to your recent letter, will state we have received by express from the Bond House Lithographers, bonds for Elgin and C Streets, which I will present to the mayor and clerk at once for their signatures. Also the ordinances have been passed on parts of 13th and 14th Streets, and bonds are now in the printer's hands for these streets. We have been obliged to have these prepared through the Bond House, in order to know that they would be accepted by them when signed, and we have urged them constantly to use haste in getting them out. The first bonds have just reached us."

Letter, signed "J. B. Jones, Prest.," dated Muskogee, Oklahoma, August 18, 1909, to Mr. A. L. Beaty, Attorney, Dallas, Texas: "I was obliged to be in Morris, Oklahoma, all day yesterday, and on my return last night, I learned you had been in the city. I regret that I did not have an opportunity of seeing you. On reaching my office this morning I have received a letter from B. B. Wheeler, attorney, representing The McNerney Company, in which he notifies the Trust Company and myself to apply the proceeds for bonds received only to the McNerney Company indebtedness until same is liquidated. I believe you should take this matter up immediately with Mr. Wheeler, and see what adjustment can be made of it. I am leaving this evening for my vacation. I shall be in the north and east for three or four weeks. Trusting you will be able to make some adjustment with Mr. Wheeler and McNerney Company to relieve us from this protest of theirs, and that matters may be quickly adjusted."

Telegram, dated Dallas, Texas, November 9, 1909, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "Newsoms request fifteen thousand dollars for McNerney Company. How about money for bonds on districts twenty-six and twenty-seven? Will same be available and save us from making this advancement? Answer."

Telegram, dated Muskogee, Oklahoma, November 9, 1909, from Oklahoma Trust Company to A. L. Beaty, Dallas, Texas: "Spitzer has demanded further transcripts. Money not available."

Telegram, dated Dallas, Texas, October 14, 1909, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "Huckleberry does not answer my telegrams. What about estimates for appointment of appraisers for four dis-

trists next Monday night? Please confer with Engineer Cheney and advise by wire."

Telegram, dated Muskogee, Oklahoma, October 15, 1909, from Oklahoma Trust Company to A. L. Beaty, Dallas, Texas: "Huckleberry at Ardmore. District thirty-five and forty-five will be ready. Impossible get other two ready for Monday."

Telegram, dated Dallas, Texas, November 24, 1909, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "When will you remit proceeds of bonds on districts twenty-six and twenty-seven? Answer."

Telegram, dated Dallas, Texas, November 29, 1909, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "Wired you twenty-fourth. No reply. Appointment yesterday but no conference. You have had bonds more than five days. See contract. I desire to be liberal but will insist on an understanding. Answer."

Telegram, dated Muskogee, Oklahoma, November 29, 1909, from Oklahoma Trust Company to A. L. Beaty, Dallas, Texas: "You must make adjustment your differences with McNerney. They forbid our paying over money."

Telegram, dated Dallas, Texas, November 29, 1909, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "Telegram received. We will adjust with McNerney when we get ready. You must pay over money or take the consequences."

Telegram, dated Dallas, Texas, November 30, 1909, from A. L. Beaty to J. H. Huckleberry, Muskogee, Oklahoma: "Please see my telegraphic correspondence of last few days with Oklahoma Trust Company. Their methods will not be tolerated. If money is tied up it must be in some other depository. If you care to straighten matter out please act promptly."

Letter, dated Muskogee, Oklahoma, January 12, 1910, from A. L. Beaty to Oklahoma Trust Company, Muskogee, Oklahoma: "Gentlemen: Please consider this my second formal demand for information in reference to proceeds of paving bonds delivered to you on or about Dec. 13, 1909. I desire to know the amount received, date of receipt and name and place of each depository thereof at present. Shall be here until 5 p. m. today and would appreciate your prompt reply."

Letter, dated Muskogee, Oklahoma, January 12, 1910, from J. B. Jones, Pt., to A. L. Beaty, Turner Hotel, City:

"The attorneys for Mr. McNerney have requested the Trust Company to make no statement to you until they have an opportunity to be present or to see same. We would like very much to arrange a meeting between you, the attorneys for Mr. McNerney, and Mr. Huckleberry, representing the Trust Company. If no agreement or settlement could be reached the entire matter could then be thrashed out before the court on some proper pleading, or on motion to dissolve the injunction. We would like for you to suggest at what time or times it would be convenient for you to be in Muskogee, and we will undertake to arrange for such a meeting. Mr. Moores of Indianapolis is of counsel for Mr. McNerney, and we are informed that he can come to Muskogee next week for the purpose of taking matters up with you. We feel it would be possible to make some settlement, or an adjustment if not a settlement, of the entire matter."

Letter, dated Muskogee, Oklahoma, January 12, 1910, from A. L. Beaty to J. B. Jones, Oklahoma Trust Co., Muskogee, Oklahoma:

"I have your note in which you decline to furnish the information requested. Referring to your request for a conference: Next Monday will suit me, and I think would be best for all concerned, as I am not willing to longer defer action in the equity case for the purpose of securing the information you refuse to give and other appropriate relief. Please advise."

Letter, dated Muskogee, Oklahoma, January 12, 1910, from J. B. Jones, President, to A. L. Beaty, Turner Hotel, City: "Replying to your favor this date, we will undertake to arrange a conference in this city for next Monday, as suggested by you. If impossible to arrange it for Monday we will notify you in time, but hope that we can have it on that date."

Telegram, dated Muskogee, Oklahoma, January 16, 1910, from Oklahoma Trust Company to A. L. Beaty, Dallas, Texas: "Moores cannot be here Monday. We are writing you."

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Also J. C. STONE, a witness introduced by the complainant, testified as follows:

I am a practicing attorney at the Muskogee bar. In December, 1909, I was employed by the mayor and council of the City of Muskogee to assist the city attorney. I was at the city hall on the night of December 13, 1909; I was not there, however, at the time of the delivery of that installment of bonds. I left before the delivery was made. I do not remember whether there was anything said about the bonds in council meeting while I was there that night. I left about

nine or nine-thirty, before the adjournment of the meeting. I had a 'phone conversation with the mayor afterwards, and I had a conversation with Mr. McNerney before I left. The conversation with Mr. McNerney was in reference to the delivery of the bonds. He told me he was going to get the bonds that night. This conversation occurred on the steps just after I started home. I do not know how much of his conversation was serious. Mr. McNerney is an Irishman and jests a great deal, and from his conversation I do not know whether he was in earnest on this particular occasion, but he remarked that he was going to have the bonds if he had to fight.

I had a conversation with the mayor later; I cannot recollect whether he called me or I called him, but we did have a 'phone conversation. I know I told Mr. McNerney that he should not have the bonds, and I went back to the mayor before going home. I related to Mr. McGarr what Mr. McNerney had said and what I had said to McNerney, and I told McNerney that he should not have them, and I stated to Mr. McGarr that I hoped that he would carefully follow the terms of the written instrument then on file. After that I went home, and I cannot recall whether Mr. McGarr called me or I called him; I think he called me. The conversation then was one that I think I could properly testify to if I could recall it. It was in reference to the bonds. I believe he asked me whether it would be proper to permit the bonds to go if Mr. Jones would say let them go, or something about like that. I hedged against that and told Mr. McGarr to stand on the contract, and right there I hung up the receiver, and that was the conversation I had.

*Cross Examination on Behalf of P. J. McNerney and The McNerney Co.*

This conversation with Mr. McNerney took place I think about nine or nine-thirty; I cannot say what time. I went to a great many of these council meetings, of course, and they usually held to a very late hour. I generally left when I got sleepy. I should say it was half an hour, possibly an hour, after my conversation with McNerney that I had the conversation with the mayor; I would think it was half past ten.

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Also J. H. HUCKLEBERRY, recalled by the defendants for further cross examination, testified as follows:

I have spoken about certain moneys being received by Merrill Moores of Indianapolis from the sale of bonds and the disposition of those moneys. In the same way in which I testified yesterday, from the same information, I will say

that Mr. Moores received the first money from Spitzer on December 27 or 28, 1909, in the form of a draft payable to his order, and placed to his credit in a bank at Indianapolis; that he paid Merrill A. Walker the sum testified to yesterday by a check on said deposit; Walker cashed said check and transferred the funds to Hamilton National Bank at Chicago to the credit of Oklahoma Trust Company.

The money that was used in the transaction in January at Kansas City was received by Moores in the form of a draft from Spitzer & Company in the early part of January, and deposited to Moores' credit in a bank in Indianapolis, and afterwards Moores caused the bank to issue the draft spoken of yesterday to Horace Speed—two for twenty thousand dollars.

I have known Merrill Moores of Indianapolis, Indiana, since the winter, I think, of 1890; at that time I was attending a university in Indiana and Moores was a practicing attorney in Indianapolis. I know his standing as an attorney and as a business man. I advised my associates as to the advisability of entrusting matters to the care of Merrill Moores. In October and November, 1909, owing to the controversy testified to between Oklahoma Trust Company, The Texas Company, The McNerney Company and McNerney over the disposition of the proceeds of the bonds sold in August, I was rather active in trying to adjust the differences, so that the work could be proceeded with, and, if possible, a complete settlement made, and the matter got rather bitter at one time, and Mr. Moores was employed by Mr. McNerney and brought to Muskogee. I was away from town a good deal during the fall, representing Southern Surety Company, and I remember to have advised every one connected with the matter that I had known Mr. Moores a long time, that he was a man of very high standing as a lawyer, that his integrity was beyond question, and that his advice could be relied upon. That was about the history of it. I understand Mr. Moores was at Muskogee, probably made two trips to Muskogee, before the delivery of the bonds in December. I knew that Mr. Moores' standing as a lawyer in Indiana was as high as any man in the state, both for ability and integrity.

#### *Redirect Examination.*

I do not remember whether the injunction of December 18th was issued just before my return home from Colorado, or just afterward. It was only a short time after its issuance until I learned of it. I think I saw a copy of the bill on Sunday evening after its issuance. I went over to the clerk's office. I think I made arrangements with the clerk and he copied it for me on Sunday and I got it Monday. I saw the

order, I think, the first Sunday or Monday after it was issued. As to Mr. Jones being in a conference or consultation about it and knowing of the injunction at that time, there was no conference about it, as I remember. I suppose Mr. Jones had been served at that time with a copy of the order. I think there was not any discussion about it between Mr. Jones and me. I really got the copy and had it forwarded to Mr. Moores at Indianapolis. I did not expect to act as attorney in the matter, because various parties were interested, and it was a matter in which I was to a certain extent personally interested, and I rather expected to stay out.

Also complainant introduced in evidence the statement of D. N. Fink, receiver, which was as follows:

"Muskogee, Oklahoma, February 13, 1911.

D. N. Fink, Receiver for Paving Bonds.

Net amount received for bonds delivered to receiver and sold.....	\$110,694.96	Disbursed under order of Court in completion of work and expenses....	\$ 50,997.16
Balance of bonds, same not sold but delivered to plaintiff under order of Court .....	\$ 34,307.99	Paid plaintiff under order of Court .....	\$ 33,681.16
		Bonds delivered to plaintiff under order of Court .....	\$ 34,307.99
		Balance on hand.....	\$26,016.64
	<hr/>		
	\$145,002.95		\$145,002.95"

Also complainant introduced in evidence transcript of the minute book of Oklahoma Trust Company, which was introduced in evidence by the defendants in equity cause 1239, for the purpose of showing that the act of J. B. Jones in signing the contracts in suit was never authorized or ratified by Oklahoma Trust Company. These minutes did not show such authorization or ratification.

Also complainant introduced in evidence the testimony of J. H. HUCKLEBERRY, when introduced by the defendants as a witness in equity cause 1239, which was as follows:

I know who has had custody of the book containing the minutes of the stockholders and directors of Oklahoma Trust Company since about January 12, 1910. I have had the custody of said book since said time. The book is now in the presence of the examiner. The book contains all the minutes of the stockholders' and directors' meetings as it was when



I first got custody of the book. So far as I know it contains all the minutes, though, of course, it is possible that some meeting was held at which I was not present and no record made of it.

*Cross Examination.*

I did not keep this book prior to the time I speak of, January 12, 1910. Up to then it was kept by some one else. All I can say is this is what was delivered to me, and it is correct as to subsequent meetings. There was the February meeting subsequent. I know of my own knowledge that it contains all the minutes from the first of December, 1909; it contains the minutes of the meetings in consecutive order. Back of December, 1909, I cannot speak of my own knowledge.

The pages in this book, which is a patent combined record book for incorporated companies, Form N, printed by Cameron, Amberg & Company, commence at page one with the number stamped in green ink in the upper right hand corner in one case and upper left hand corner in the other case, but it appears throughout the book that the pages were numbered originally. This book appears to contain the original pages from pages 1 to 11 consecutively; then the leaves from 12 to 29 have been cut out an inch and a half from the binding and typewritten pages have been pasted on. A corresponding page written on with a typewriter has been pasted in for each of the pages taken out. On said typewritten pages are written the by-laws of the company, which did not correspond with the form of by-laws given in the book, and so we adopted the method of cutting a portion of the pages off and pasting in the typewritten by-laws.

On page 7 of the by-laws section 4 has been cut out entirely and section 5, which is on page 8, has been renumbered in pen over the original number, indicating that whatever was in there as section 4 originally has been cut out. I know how that was done. It was done before the adoption of the by-laws. I prepared the form of by-laws, and section 4 was not adopted for some reason, and rather than rewrite it I simply cut it out and changed section 5 to 4. Commencing with page 35 to page 79, excluding 79, the pages have been cut out and minutes of various meetings and proceedings of the stockholders and directors have been pasted in in like manner, and page 79 has not been actually cut out, but a typewritten sheet has been pasted over the original page. Then commencing with page 81 similar treatment has been given up to and excluding page 97. Then in addition to the sheets that are pasted in there are a number of loose sheets showing meetings subsequent to May 29, 1909. These last mentioned loose sheets have never been pasted in the book,

but so far as I know they have been kept in the book in place. I have had the book under lock and key since I have had it, only exhibiting it once or twice.

Commencing say in January, 1909, the directors and different committees had informal meetings that did not go down in the minute book. There were committee meetings and also the directors frequently held consultations or informal meetings when there were no regular meetings called, when all the members were not present, and they discussed the affairs of the company without entering the minutes on the book.

I think Mr. Jones was not present on January 5, 1909, when this first contract in suit was signed up. He was not in the city. I asked Mr. Alison to sign it. Mr. Thomas H. Owen signed the instrument, but I do not remember whether he was present in the bank when Mr. Alison signed it or not. Mr. Bundy was not a director at that time. I think Mr. Paulhamus was in the bank, or in town, at least, at the time of the execution of said instrument. Generally speaking, Mr. Paulhamus knew about it; I do not know just when he acquired his knowledge.

When the contract of June 14, 1909, was executed Mr. Jones and Mr. Paulhamus were present. The instrument is signed by Mr. Jones and witnessed by Mr. Paulhamus. I was also present. I think at that time Mr. Bundy was cashier of Oklahoma Trust Company, and, if so, he was present in the bank. The minutes will show whether Mr. Bundy was a director at that time.

As to when, with reference to the first contract, I discussed the matter with or in the presence of Mr. Paulhamus, or know that he knew about the terms of the contract, my recollection is now that I talked about the matter with him both before and after the execution of the contract. He understood that a contract along these lines was to be executed. I am not so clear as to when I discussed the matter with or in the presence of Mr. Jones. The general proposition as to causing a loan to be executed from The Texas Company to The McNerney Company was discussed before Mr. Jones went away, prior to the execution of the instrument, and was also discussed with him after his return; I do not know that he ever knew just what was in the instrument until June. My recollection is Mr. Alison kept one copy of the instrument in the bank, and Mr. A. L. Beaty kept a copy, and perhaps I kept a third. I guess there were only two copies; I think Alison kept one. I am not clear as to whether Mr. Jones understood before the contract of January 5th was executed that an arrangement had been agreed upon which was reduced to

writing. I understand that Mr. Beaty and Judge Brooks were present at one time and discussed the matter, but I cannot recall that I was present. Mr. Jones and I had discussed the matter before he left, but I cannot remember as to whether at the time I talked with him generally he knew the details of the proposition.

Mr. Kerr was not a director January 5, 1909. Let me refresh my recollection as to when he became a director (referring to minute book). Mr. Kerr was elected June 16, 1909. The date of the second contract was June 14, 1909, two days before he was elected. I see from this record also that Mr. Bundy was not elected cashier until June 16, 1909, so he was not cashier at the time; Mr. Bundy had been elected director prior to that time. I am not able to answer in reference to Mr. Kerr's knowledge of the contracts. I have no positive recollection of talking to Mr. Kerr about the matter until September, 1909; I was away from home most of the summer, during July and August, only returning in September. Upon my return I discussed with Mr. Kerr several times the conditions which grew out of the transaction and conflict between the interest of Oklahoma Trust Company and The Texas Company and McNerney; I do not remember the details. Kerr knew in a general way the terms of the contract, that is, that they undertook to give The Texas Company a first lien on the returns; he knew it at that time.

I know that I had talked with Mr. Jones about it prior to the signing of the second contract. I know he understood the details of the first contract in regard to The Texas Company and Oklahoma Trust Company and The McNerney Company, but I do not remember telling him that Mr. Bundy had signed his name personally to the first contract.

The directors of Oklahoma Trust Company on January 5, 1909, were Jones, Huckleberry, Paulhamus, Owen and Alison, who were resident directors living in Muskogee, and W. G. Sawyer, F. L. Sawyer, W. H. Roeser and R. S. Litchfield, who did not live in Muskogee. May 29th Mr. Litchfield and F. L. Sawyer resigned, and R. W. Kello was elected to fill the vacancy caused by the resignation of Sawyer and W. B. Bundy was elected to fill the vacancy caused by the resignation of Litchfield. The next change was June 16th, when W. G. Sawyer resigned and Eugene M. Kerr was elected in his place. It seems to me A. T. Alison stayed on the board for awhile. W. G. Sawyer lived at Nowata. F. L. Sawyer lived at Independence, Kansas; Litchfield lived at Independence, Kansas. Mr. Rosier lived at Tulsa, Oklahoma. None of these gentlemen who did not live at Muskogee attended meetings of the directors regularly. I think the minutes which have

been introduced in evidence will show when they attended and which ones attended. In 1908 they were more frequently at the meetings than in 1909; I do not recall any meeting at which they were present in 1909.

Mr. Bundy did not sign the second contract. To my knowledge Mr. Bundy knew of the execution of the second contract. R. W. Kello never attended the directors' meetings to my knowledge. I do not know when, if ever, Rosier learned of these contracts and the particulars; I do not know when, if ever, Litchfield and the two Sawyers learned of them.

An instrument was executed on January 5, 1909, by The McNerney Company to Oklahoma Trust Company, which is pleaded here. I do not recall who suggested the execution of that instrument; I drew the instrument to take the place of a prior assignment which was not as specific as the one of January 5th. The difference between the two was, I think the one of January 5th perhaps mentioned the streets, while the other did not. This instrument was executed by The McNerney Company and delivered to Mr. Alison. It was delivered before the one to The Texas Company—I mean before the signing of the one to The Texas Company. I do not recall the time of day it was delivered. I know I delivered it before. I intended to do that. It was the expectation from my conversation with Mr. A. L. Beaty that The Texas Company had such an instrument, and so I was careful to deliver the assignment from The McNerney Company to Oklahoma Trust Company before Mr. Alison executed the agreement of January 5th to The Texas Company. I think Alison is now assistant cashier of Exchange National Bank, Tulsa.

I could not answer as to whether on January 5, 1909, McNerney had overdrawn his account with Oklahoma Trust Company, and whether any part of the first money The Texas Company put up went to take up the overdraft.

The general way in which the funds The Texas Company advanced were delivered to the bank was: Mr. H. Y. Newsum made the deposit to the credit of The Texas Company and drew against the funds on drafts signed by The Texas Company. I think the drafts were signed by Newsum and countersigned by Handy. I do not know approximately in what amounts these deposits were made. I do not know that one deposit as large as \$14,000 was made, nor that some \$20,000 deposits were made. All of this money passed through Oklahoma Trust Company was deposited by The Texas Company and checked out to pay McNerney accounts. The officers of Oklahoma Trust Company knew the plan or arrangement

under which this money was being advanced and passing through the bank—those who attended meetings and were officers.

I remember the circumstance when \$19,279.84 in sewer warrants was paid by the city to The McNerney Company and paid by The McNerney Company to The Texas Company about the 19th of April, 1909. I do not know whether the officers of Oklahoma Trust Company knew about that at the time. I knew about it; I do not know what other, if any, knew about it.

A number of large loans were made, or large discounts purchased, such as Exchange Oil Company and others, during that year, 1909. I do not know whether these minutes show the approval by name of those loans. I have not refreshed my recollection as to whether they were taken up and discussed at board meetings. I remember, for instance, after the closing of the Columbia the Norton interests owed us some money and the question came up as to whether or not we should pay off the note that he owed to the bank in Olean, New York, and that matter was considered by the board; I do not know whether a minute was made of it or not. We purchased that note as collateral, under arrangement with Mr. Norton by which we got collateral for other loans which we had.

I was not present in Oklahoma at the time when the first money was collected by Oklahoma Trust Company from the sale of bonds under these McNerney contracts, and I cannot say whether Oklahoma Trust Company did not apply it on its debt but passed it to a special account. I afterwards ascertained how it had been kept, along in September. It was then in dispute between The Texas Company, The McNerney Company and Oklahoma Trust Company, growing out of that transaction of August, and it was carried in a special account pending the adjustment of the difference between the three parties. I do not know whether the books show that it had been carried in that way from the beginning, but it appeared in a special account at that time, and had not been applied. That was the dispute, the McNerneys claiming that it should be applied. The position of Oklahoma Trust Company was not that it would not do anything with it but would hold it in a special account until it could be adjusted. The position of Oklahoma Trust Company was to get the dispute settled. I think I advised when I got home that an adjustment be had, if possible, and when it became impossible then we agreed on the plan of turning it over to The Texas Company for use in the finishing of the work in town, the matter to remain *in statu quo*. I do not remember that on the night when we

finally closed it up I or Mr. Jones brought Mr. Beaty a certificate of deposit, or that I or Mr. Jones called attention to the fact that it had been kept in a special account from the time it was received.

When the next installment was received by Oklahoma Trust Company from the sale of bonds under these contracts, I think it was carried in the name of Oklahoma Trust Company, trustee, up to the time that Oklahoma Trust Company sold out to Alamo State Bank. It was carried as a special account, and was not applied on any indebtedness up to January 3, 1910. It was being used all the time up until the institution of this litigation so that McNerney could use it in carrying on the work. In that way it was reduced from thirty odd thousand to twenty thousand dollars, and the rest would have been used in the work, but it was being kept in a special account.

When the temporary adjustment I speak of was made in September it was understood that that was without prejudice to the rights of any of the parties. I understand that the balance that was turned over to The Texas Company of something over \$27,000 represented the net proceeds of the bonds that had then been sold, less some engineers' fees that were paid. It was less the amount of that McCluskey advancement, I understand. In other words, the full amount paid by Oklahoma Trust Company to Oklahoma State Bank, of some \$7084.00, was deducted, and Oklahoma Trust Company reimbursed itself to the full amount of that and also for the engineers' fees it paid, and this twenty-seven thousand some odd dollars that was turned over on September 25th was the net balance. There was a good deal of discussion among the officers and directors of Oklahoma Trust Company who lived in Muskogee and were active in the management of its affairs in reference to this matter, commencing from about the time I returned from my vacation in September on for the balance of the year. Generally the Muskogee directors all knew substantially the status of the affairs as they stood, the claims of the parties, and the controversy in its different bearings, and what had been done and what was proposed. We did not advertise some of the differences.

I remember \$14,000 being advanced by The Texas Company, deposited in Oklahoma Trust Company under these contracts, and checked out in the way that has been described, after the \$27,000 was taken down in September. That \$27,000 was passed to The Texas Company's credit that night, and some time later, say along in October, it took out \$10,000, and then at a later day it put back \$14,000; that made an advance of \$4,000. That money was used in this work.



Mr. Beaty and I had quite a lot of discussion in the fall of 1909 and several conversations looking to some adjustment of this matter, and also particularly to a completion of the paving work. We put in some time together getting up legislation, that is, preparing descriptions of the property and checking some descriptions that had been prepared; we had blue prints and assessing ordinances and found some errors and had to send out and get some quitclaims from some people in town; we had a number of conversations and much discussion about the matter. I never made any claim of such kind, that I recall, to Mr. Beaty or any one representing The Texas Company or Farish, as *non est factum*, or as that the officers of Oklahoma Trust Company who had signed these contracts had no authority to do it. I was not present at any time when anybody else made such a suggestion up to the time this answer was filed in this case. I did not make any contention of that kind, that I remember, in the answer to the petition for a receiver. The answer to the petition for a receiver was prepared after consultation between Mr. Speed, Mr. Moores, Mr. Wheeler and myself.

*Redirect Examination.*

We discussed between ourselves the question of what validity or binding force these contracts had. I did not mean to state just now that that question had never been raised among ourselves; I mean simply that I had not told Judge Beaty or any one connected with The Texas Company. I do not know whether at a meeting of Oklahoma Trust Company in September, 1909, suggestion was made by me that those contracts were not binding, and that Mr. Beaty got real angry about it; there were so many things said there between all of us that I would not say whether I heard it or not. I have no recollection whether Mr. Beaty at that time was advised of the contention that the contract was not binding on Oklahoma Trust Company. Mr. Beaty was certainly there; we were having a jolly good time. There was no meeting of Oklahoma Trust Company at the time at which Mr. Beaty was present. It may be possible that Mr. Jones, Mr. Wheeler and myself were present with Mr. Beaty when that question was raised, but I do not now recall it. It was discussed among people connected with Oklahoma Trust Company as to whether or not this contract was binding. At that time it was mentioned among ourselves that the contract was not binding on Oklahoma Trust Company. I do not recall it if Mr. Beaty was informed of that contention at that time.

The \$27,000 that was taken down in September was the proceeds of the sale of bonds on C Street and Elgin Avenue, as I remember. They were sold by Oklahoma Trust Company

to Spitzer & Company in August. It was then that the first difficulty came up between the parties to this agreement. The point at issue between them was: The McNerney Company, through Mr. McNerney and Mr. Wheeler, its attorney, demanded that the proceeds of that bond sale should be applied to the indebtedness due to Oklahoma Trust Company from The McNerney Company and McNerney, and it seems that at that time notice of Oklahoma Trust Company was called to an assignment held by Oklahoma State Bank, or some of its officials, made in the fall of 1908 by McNerney's assigning an interest in these bonds, and Oklahoma Trust Company paid some seven or eight thousand dollars to Oklahoma State Bank and this assignment was assigned by Oklahoma State Bank to Oklahoma Trust Company. That was the status as I found it upon my return in September, 1909, and it was out of that controversy that these various conferences with Judge Beaty and all of us—that is, Mr. Wheeler, Mr. Jones, Mr. McNerney and myself—followed in September and continued up to the time of the beginning of this action in December; at all times The McNerney Company demanding that Oklahoma Trust Company credit these funds to the indebtedness due Oklahoma Trust Company, and Mr. Beaty for The Texas Company demanding possession of the funds under the contracts of January 5th and June 14th. Mr. Beaty at that time was notified and, of course, thoroughly understood the position of Mr. McNerney and Mr. Wheeler, and the position of Mr. Jones, representing Oklahoma Trust Company.

*Recross Examination.*

By saying that Mr. Beaty thoroughly understood the position of these parties, I do not mean that he understood their position in reference to *non est factum*, or anything of that kind; I mean he understood their position as to the controversy, that is, the demands made by The McNerney Company. I think Mr. Beaty first learned that Oklahoma Trust Company through Mr. Jones had agreed to the demand of The McNerney Company through Mr. Wheeler in Muskogee, in September. There was a written proposition made by Mr. Wheeler, representing The McNerney Company and McNerney, to Oklahoma Trust Company, and a written acceptance of it. My recollection is that Mr. Beaty's first knowledge of that was when those instruments were shown him in September. That was Mr. Beaty's first knowledge that Wheeler's demand had been agreed to. I do not mean to say there was any conference in which Mr. Beaty participated at any time, where he was informed that Oklahoma Trust Company would contend that it was not bound by these contracts, or that any question would be raised or could be raised. I do not remem-

ber that at one time after the question came up and after the receiver really had been appointed Mr. Beaty asked me the pointed question: "What are Oklahoma Trust Company's defenses to be?" and that I said: "That our document had not been recorded and that was the chief defense." I remember Mr. Beaty's asking me that question, and I told him that I did not care to go into what our defense would be, something of that kind. I do not remember that I mentioned the failure to record these instruments as a defense we had, but I do remember that Mr. Beaty asked me what our defenses were and that I did not say anything about this *non est factum*. It is not true that I purposely kept that out of the answer for a receiver. I do not remember why that defense was not put in the answer for a receiver; my recollection is that the real issue was not plead in that answer, and the question of the general solvency and denial of right to a receiver was plead. I do not remember that the issue raised by the motion and the bill and by the amended bill was that Oklahoma Trust Company, which had assumed to act as a trustee, had become hostile to The Texas Company, and that in answer to that I denied that it assumed an attitude of hostility. There was not, that I recall, in all the arguments before the court and all the discussion any intimation, by word of mouth or otherwise, that there was such a defense, as *non est factum*, or that there could be made or would be made any such defense.

The officers and resident directors of Oklahoma Trust Company knew that The Texas Company was keeping this account, depositing this money, and that it was being checked out to pay the McNerney accounts the way it was, except the vice-president, Mr. Litchfield, who was not a resident of Muskogee.

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Also stipulation in said equity cause 1239 that the work on all the streets for which bonds were to be delivered was completed and accepted by the city before the bonds in the street improvement district covering those streets were delivered, and that The Texas Company had furnished the maintenance bonds to the city, mentioned in the contract of March 26, 1910, and that the \$1,000.00 bond mentioned in the testimony of Charles Wheeler, Jr., City Clerk, as having been retained temporarily, had been delivered, said bond having been the last of all the bonds to be delivered under the contracts.

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Also complainant introduced in evidence the testimony of A. L. BEATY, when introduced as a witness in rebuttal by plaintiff in said equity cause 1239, which was as follows:

I reside at this time at Houston, Texas, and am associate general attorney for The Texas Company. I represent the plaintiff, W. S. Farish, in this case. Prior to about the first of September, 1910, I lived in Dallas, Texas, for several years. I was attorney for The Texas Company then and I represented Mr. Farish at the beginning of this suit and have represented him throughout up to date as one of his solicitors.

The matter of The Texas Company's arrangement with Mr. McNerney and The McNerney Company was to a great extent, if not altogether, in my hands, and I fell into the transacting of considerable business apart from the work of an attorney proper. Some time in the fall or winter of 1908—in fact, it was when Mr. McNerney ordered the first shipment of asphalt—the question of guaranteeing the payment came up, and I made one trip, or possibly more than one trip, to Muskogee in that connection. A guaranty to the extent, I believe, of one hundred tons was demanded, and I am not sure whether the shipment was released, but I believe it was. At any rate, very soon after that Mr. McNerney raised with me the question of the company paying for labor and a great many material bills that went into the streets, stating that he could get no more money, and suggesting that we were interested in the work which his company had commenced, and I made a visit to Muskogee in that connection. I urged upon Mr. McNerney that we be relieved of that. My insistence with Mr. McNerney was that he go and finance the matter in Muskogee or elsewhere, and that we did not care to go any further than to sell him the asphalt and furnish the plant and other equipment that had been furnished. My recollection is he said he would make another trial and see what he could do and let me know. After I got home I received a letter from Mr. McNerney, dated the 17th of December, 1908, which I introduced in evidence, reading as follows:

“My Dear Judge: I have worked all day and accomplished nothing. Getting the money is out of the question. The pay-roll of \$5,000.00 will be due on Saturday and I expect to sacrifice the last thing I have that is tangible to make it in the hopes that The Texas Company will help me. If Captain Peterson is in port with the Texas I would like to make a trip with him as Saturday it will be too hot for me here. If the company can preserve the situation and take the proceeds I would be glad indeed as it would in a way pay me for six months.

of the hardest fight I ever made. With my kindest personal regards, I am, Respy, P. J. McNERNEY."

I took that matter up with my people at once. The president of the company was in California and in his absence it was decided that we would not make the advancements that Mr. McNERNEY desired, and I wrote him from Dallas, December 21, 1908, as follows:

"Mr. P. J. McNERNEY, Muskogee, Oklahoma. Dear Sir: I regret to advise that my people cannot see their way clear to take your Muskogee paving contracts off your hands or to advance the capital necessary in completion of same. The dating which I agreed to give you on asphalt under guaranty is as far as we can afford to go under the circumstances. Yours very truly, A. L. BEATY."

After that the president of the company returned, or was returning, and on his way home, I think at El Paso, he got a copy of the communication that had passed between other officers of the company and me, and he indicated to me that he would probably want to reconsider that. Thereupon, on December 24, 1908, I wired Mr. P. J. McNERNEY as follows:

"If your matters can be postponed until January 1st it is possible, but not certain, that proposition may be reconsidered. Please advise."

He replied by night telegram, same date:

"Can stay in until January 1st. Wish you a Merry Christmas."

After that, and on either the 28th or 29th of December—I think it was the 28th—Judge R. E. Brooks, who is now and was then treasurer of The Texas Company, and I came to Muskogee to see what sort of an arrangement could be perfected. We talked the matter over with Mr. McNERNEY, and, conditioned upon a checking up of the work that had been done by somebody knowing about those matters, we agreed tentatively to get behind him and advance him some money, at any rate, relieve the situation that was upon him. I think Mr. Handy was on his way to Muskogee then to make a report of the work. I know he had been instructed to come and was on his way.

One of the conditions imposed in this arrangement we offered to make with Mr. McNERNEY was that The Texas Company should have a first lien upon the bonds and proceeds of the work, whatever he got, and he indicated that he would expect to give that and it was satisfactory. After supper that night, I think it was, Mr. McNERNEY, Judge Brooks and I went

to see Mr. Jones of Oklahoma Trust Company. Possibly some others were present; I am not sure. The idea was that the arrangement would be explained to Mr. Jones. I understood from Mr. McNerney that Oklahoma Trust Company had advanced him some money and that it had an interest; I am not clear whether I was informed that it had a lien on the bonds or not. Mr. Jones at first seemed like he wanted to dismiss the matter without going into it fully. He made a statement to us that they thought well of Mr. McNerney. What we wanted to do was to get down into a discussion of it in full. It was discussed some time and I have a reasonably clear recollection that it was stated that we were going to make advancements to Mr. McNerney to help him out of the dilemma he was in and probably help him complete the contracts, if necessary; in other words, to get behind him; that we would expect to take a first lien upon the proceeds that he was going to get. Mr. Jones acquiesced in this plan; I do not remember what he said, but he made no objection to it, and so far as I can remember he approved it. We returned that night, that is, on the night of the 28th or 29th. After I got home I prepared a contract and I brought it with me to Muskogee on January 5th. I left home on the night of the 4th and returned on the night of the 5th, is my recollection. I have looked at my expense account and other data I have and letters in the files, and they all show that that is correct. While I was at Muskogee this contract was executed as it appears here in the record.

In reference to the contract of June 14th, I have been unable to recall or to refresh my memory whether I brought that to Muskogee in person or whether I sent it by mail to someone, but it was executed by the parties whose names appear there to it. The Texas Company advanced the moneys shown by the record and testified in this case through my office at Dallas. Possibly a draft was drawn for the first payment of \$3,500.00. My recollection of that is that McNerney had issued his checks in payment of materials and other things for some \$5,900.00, practically \$6,000.00, and that a large part of them had been credited, entered up and charged to his account by Oklahoma Trust Company. The vouchers are here in court, the original checks, as I understand, and the stamps on them will show whether it was before January 5th, but that is my recollection of it at this time. I think the first advancement was in the shape of a draft drawn on The Texas Company to take up that overdraft. At any rate, Oklahoma Trust Company got part of this first money that was advanced. I think the total amount of checks that were issued by the McNerneys and that were redeemed by The Texas Company in that way was practically \$6,000.00. After that



the money passed through my office at Dallas. It would be forwarded to me from Houston, the general office of The Texas Company, and I would send it to Mr. Newsum at Muskogee. The amounts varied according to the needs. I think about \$20,000 was the largest amount sent, and from that it ranged down to \$5,000, and possibly less.

A very few days after—I think it was before this first draft was given, but I am not certain—Mr. McNerney suggested the keeping of the account with Oklahoma Trust Company, as it was interested in the matter, and that was agreed to, and this money was kept there. It was sent to Newsom at Muskogee and deposited with Oklahoma Trust Company to the credit of The Texas Company, and The Texas Company's checks signed by Newsom and Handy were issued against it, payable to the parties who furnished materials, labor and things of that kind in the paving work. The total shown in the account was cleared through Oklahoma Trust Company in that way, deposited from time to time and checked out in that way.

I should state that before making this contract of January 5th I received the report of Mr. Handy, who came here to Muskogee to check up the work. (Here followed the report, dated December 31, 1908.)

I wish to state that on or about the 19th of April, 1909, The Texas Company received the City of Muskogee's warrants on account of some sewers, I think it was, that were included in this work, amounting to \$19,279.84. No specific credit is given in the bill of complaint for this, but it is suggested in the bill of complaint that the defendant probably has offsets to the amount of \$20,000. This particular credit was in mind when that allegation was drawn. These warrants we promptly cashed at one hundred cents on the dollar.

I had several talks with Mr. Jones, president of Oklahoma Trust Company, about this business during the summer, and I had a good many with Mr. Huckleberry and a few with Mr. Jones in the fall, after both of these gentlemen had returned from summer trips that they had taken.

In September when the question came up in reference to the first bonds that had been delivered, the whole matter was threshed out from the different view points between Mr. Huckleberry and me. We tried to effect some adjustment of it. First we tried to find a permanent adjustment of it. Mr. Jones participated and suggested that I rebate Mr. McNerney the interest; that was one of the things he suggested. Finally after much discussion it was agreed that from the proceeds of the sale of those first bonds Oklahoma Trust Company would deduct the engineering fees it had paid out, also the

commission, one per cent, which it got over ninety cents, as I understand, and also the amount which it had paid Oklahoma State Bank for its McNerney claim, leaving a balance which is stated here in the bill amounting to \$27,906.57; that this money would be passed to the credit of The Texas Company without prejudice to the rights of any party as to the ultimate right to it. It was credited to The Texas Company on the books of Oklahoma Trust Company, September 25, 1909.

At or about the time these bonds, the proceeds of which I have been testifying about, were turned over to Oklahoma Trust Company, bonds on two other streets were delivered. It was found that there was some defect in the legislation or something in connection with these bonds that required them to be re-printed, and that was done, and it was later in the fall when they were in shape to be delivered and to be sold by Oklahoma Trust Company.

It was made clear by me to Mr. Huckleberry and to Mr. Jones in our talk in September that The Texas Company would claim the proceeds, and my recollection is that it was also stated that as matters then stood we would expect Oklahoma Trust Company to take them from the city. The question was not closed as to whether Oklahoma Trust Company would turn over the proceeds, but was left open. When it finally sold the bonds and I learned that it had the proceeds, or got information to that effect, the correspondence that has already been introduced in evidence between Mr. Jones and me resulted.

In all the negotiations that I have mentioned and on up to the time that the answer of the defendants in this case was filed no one suggested to me or stated that there was any question about the authority of the officers of Oklahoma Trust Company who signed these agreements on January 5th and June 14th, and there was no intimation to me by any person that the plea of *non est factum* would be made, or any other plea questioning the right of these parties who signed these instruments to bind Oklahoma Trust Company. I also say that when this agreement that has been introduced by the defendants was made sometime in March, 1910, there was a lot of conferences and discussions of matters, not only at the time it was actually signed, but we had the question of such an agreement up once before and had virtually agreed on it. Each of these times it was discussed at great length and nothing was said about any such defense. In fact, I asked Mr. Huckleberry one time what defense they were going to make—I did not know whether he would tell me or not—and he may have said that he didn't believe he would tell me, some-

thing of that kind. But in that connection he did refer to the question of whether The Texas Company's pledge or mortgage lien would be valid against Oklahoma Trust Company, it not having been recorded. That question had previously been argued to Judge Campbell on the hearing of the application for a receiver and the motion to dissolve the injunction. That proposition was argued, and I replied to it, among other things, by saying to the court that Oklahoma Trust Company was a party to the agreement and it could not invoke that rule. Judge Campbell indicated that that was his opinion and the representatives of Oklahoma Trust Company did not then suggest any question about the authority of the officers to sign the instruments. As shown by the record, the receiver was subsequently appointed. The injunction was not dissolved.

In none of the negotiations that I had with the representatives of Oklahoma Trust Company prior to the filing of this bill was it suggested by them, or any of them, that Oklahoma Trust Company would claim priority as against The Texas Company or the plaintiff, but it was stated that McNerney and his attorney were demanding that the proceeds of the bonds be applied on McNerney's indebtedness and the indebtedness of The McNerney Company to Oklahoma Trust Company. They never stated that on their initiative, or as coming from them in the first instance, there was such a contention or would be, that is, up to the time the bill was filed.

The statement that has been introduced in evidence signed by J. A. Handy was, according to information given me by Mr. McNerney, and Mr. McNerney about the same time made substantially the same statement to me in reference to the work that had been done.

Commencing on January 5, 1909, or a short time thereafter—I would say certainly not exceeding a month thereafter—I had numerous conversations with Mr. Paulhamus, who was secretary of Oklahoma Trust Company, and an active officer of that company, in which we discussed the matter of the McNerney contracts, the probable results, and also whether there would be anything left for Oklahoma Trust Company after The Texas Company was reimbursed. Mr. Paulhamus fully understood and knew that there was an agreement signed by Oklahoma Trust Company to the effect that any lien it had or might acquire would be subordinate to the lien of The Texas Company. His knowledge and understanding of this fact dated back to January, 1909, if not to the very date the contract of January 5, 1909, was signed.

I also had a conversation with Mr. W. H. Rosier, who was then one of the directors of Oklahoma Trust Company, in

Muskogee, on or about the 25th of September, 1909. Our conversation commenced in the front part of the place of business of Oklahoma Trust Company, and we went from there into a private room and finished our conversation there. This was at a time when the controversy was going on as to whether the proceeds of the first bonds should be paid over to The Texas Company or should be applied by Oklahoma Trust Company in accordance with the demand made by Mr. Wheeler as attorney for the McNerney people. Mr. Rosier asked me to give him a statement of the situation in full, which I did, explaining to him, among other things, the two contracts that had been signed by Oklahoma Trust Company, and that they provided in substance that the lien of The Texas Company should be ahead of any lien or claims which Oklahoma Trust Company had or might acquire. He expressed no surprise at this information.

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Also A. T. ALISON, a witness introduced by the complainant, testified as follows:

I reside in Tulsa. In January, 1909, I resided in Muskogee, Oklahoma. At that time I was cashier of Oklahoma Trust Company. J. B. Jones was president of that company.

Counsel for complainant hands me a contract purporting to have been executed by and between Peter J. McNerney and The Texas Company, and a waiver of the rights of Oklahoma Trust Company, dated January 5, 1909, and purporting to have been executed by McNerney and The McNerney Company, Oklahoma Trust Company and The Texas Company. I have knowledge of the execution of said instrument on the part of Oklahoma Trust Company. It was executed by Oklahoma Trust Company and it was signed for said company by myself as cashier.

With reference to any authority I had for signing said instrument for Oklahoma Trust Company, there was a meeting held of the board of directors—some of the directors, at least, and I think a majority of the directors—of Oklahoma Trust Company, in connection with The McNerney Company, and also I think Mr. Beaty was present at the meeting. This matter was discussed and this contract was drawn up and signed, I presume, on this date it is dated. I mean to say, the board of directors of Oklahoma Trust Company authorized me at that meeting to sign that instrument; they had a meeting and it was discussed and entered into and agreed to and signed; I do not remember the specific authority, but we were all there and it was done. To the best of my recollection, Mr. Jones was present at that meeting, and Mr. Huckle-

berry, and possibly Mr. Owen, and I am very sure Mr. Paulhamus was there. I think there were nine directors of the company all together. I said there was a majority of the directors present at that meeting. Myself, Paulhamus, Jones, Huckleberry and Owen would have been a majority; I was one of the directors.

I cannot say positively now whether or not there were any minutes kept of said meeting which directed me to sign this instrument as cashier, but I think the meeting did authorize the signature whether there was any minute kept of it; nothing to the contrary came to my knowledge. I cannot say just whether the instrument was present and examined by the parties. The plan was discussed and the agreements were discussed, and this was the contract resulting from it; I do not remember just what the procedure was exactly. It was in obedience to the instructions of that meeting that I signed it as cashier.

After this contract was signed by me we proceeded under the agreement. Certainly the officers of Oklahoma Trust Company knew that it had been actually signed, and the agreements as therein made were carried out with the knowledge of the directors and officers of the company. With reference to the knowledge the officers and directors had as to the carrying out of the provisions of that contract; this contract provided The Texas Company should advance certain moneys for The McNerney Company that had been remitted to the bank, and the bank, of course, gave them credit for it, and that would be checked out, the checks being countersigned by The Texas Company's representatives. The officers and directors had knowledge that that thing was done.

Mr. Jones, the president of the company, knew of said agreement. This was January, 1909, and I left there in June, 1909. In that time from January 5, 1909, until the time I left Oklahoma Trust Company I never heard anything contrary to the validity of this instrument from any officer or director of the company. Mr. Huckleberry had knowledge that this instrument was executed by me. Mr. Huckleberry had knowledge that the terms of it were carried out as I have just stated.

#### *Cross Examination.*

Oklahoma Trust Company kept a regular book in which the minutes were recorded—all the important meetings. Meetings that were either regular or called meetings were kept. I think this was a special meeting. With reference to its being pursuant to notice, most of the directors there were accessible, and they were called in; that was usually done; they would be called in and matters discussed. I do not know



that they were notified by mail or any official notice. They would be asked to come over. It was an important meeting. I am unable to say whether the contract was present at the meeting. I think it was signed the same afternoon of the meeting, if I recollect correctly. I do not recollect now that there was any motion offered by any one that I be authorized to sign the contract. I presume likely the contract was drawn up after we had the meeting. I am unable to say whether the contract was there during the meeting, or whether it was fixed up after the meeting and signed after; I am of the opinion it was signed while all of them were there. I cannot say that it is true that no motion was made authorizing me to sign the contract. My recollection of it is the discussion of it was more or less informal, that they would make some kind of a contract. I do not know whether the contract had been drawn at that time. I have no recollection of any motion made by any director at that meeting to authorize me to make a contract on behalf of Oklahoma Trust Company covering the subject matter of his contract. When I tell the referee that I was authorized by the board of directors to sign this contract, I mean that they were there, they discussed it, and they agreed to these things, and they drew this paper and I signed it. I signed the paper that afternoon. As to who told me to sign it, it was the general consent that the trust company should execute a contract. The contract was to be executed by the trust company, and as cashier I presumed it was understood that I should sign it, and I did.

I would not say positively that all of the directors were present when the contract was signed; I know some of them were there. It was that afternoon, before the meeting had dispersed, the contract was signed. I think Jones and Huckleberry were present at the time. It is my recollection that Mr. Huckleberry prepared the contract, that his stenographer did. I swear that the contract was brought to that meeting and presented and I signed it before all of the meeting dispersed; I am unable to say exactly how many were present; I know some of them were there; it was discussed during the afternoon, and Mr. Beaty was there. I have not been advised that if I do not show that the directors authorized me to sign the contract I will be held personally liable on it. I have no advice to that at all.

With reference to how long it was after the meeting was held before the contract was brought to me for signature, I am unable to give very many details about it. As I say, my recollection is this contract was signed as a result of that meeting, and was signed the same afternoon, and further than that I could not be very precise and particular about it.



I think I was there during the entire meeting. I possibly wrote up the minutes of some of the meetings at that time; I think Mr. Jones did it usually. Some times I did act as secretary for the company, but I think Mr. Jones prepared some of the minutes of the meetings along about that time; I think he usually did. I do not know who prepared the minutes of this meeting. Mr. Jones must have presided at the meeting. I have no personal recollection of his having presided on this particular occasion more than the usual procedure. I do not positively remember any motions being made at said meeting. As to who wrote the minutes between that time and the time I left the company, there were not very many formal meetings; most of the meetings were informal. The meeting in question was held in the directors' room of Oklahoma Trust Company. The directors of the company at that time were Jones, Huckleberry, Paulhamus, myself, Owen, Litchfield and Sawyer—possibly that is all there were. I do not state positively that no motion was made at that meeting by any person authorizing me to make this contract; I say I have no recollection; I do not remember any motion being made at all; I do not remember any other motion that was made at that meeting.

I depended upon the instructions of the board of directors, the carrying out of their agreement, for my authority to sign the contract as cashier of the bank. I did not have any formal instructions given me by the board of directors about signing the contract. The informal instructions were: The meeting agreed that they would enter into this contract, and they presented the contract to me, and I signed it. I remember no instructions they gave me about signing it. I presume Jones or Huckleberry presented the contract to me for signature; I think Jones and Huckleberry brought me the contract. I have not read over the testimony in this case. I could not state definitely who brought me the contract, because it would be a matter that would not impress itself, nothing to make it especially easy to remember; I do not remember the presentation of the contract for signature at all. It might have been any other person than Jones or Huckleberry connected with the bank that presented it to me. So far as my recollection is concerned it might have been McNerney who brought me the contract. I do not think it was Mr. Beaty who brought me the contract for signature. Mr. Huckleberry prepared those things. I have no recollection at all independent of the custom of the bank about who brought me the contract; I am certain it was all finished up that afternoon.

I had no particular idea about the matter of my authority further than the trust company had agreed to sign the con-

tract and I signed it as cashier. I thought that was my duty. I knew I had the general consent of the meeting. I got that consent by the discussion and the sense of the meeting as it was held. I do not think the question as to whether I should sign that contract was discussed at any time during that meeting. I have no recollection of the question as to who should sign the contract having been mentioned at the meeting at all. I just signed it because I was cashier and it was presented to me; that is the truth of it.

*Redirect Examination.*

I do not know that I do understand the purport of the last question on cross examination. Certainly I mean that the board of directors had authorized the contract to be signed by the company, and under that authorization I being cashier signed the contract. I signed it because I knew they did authorize it, that that was the understanding, that it was authorized and agreed to. I do not remember any adjournment of the meeting before the contract was signed, nor is it my recollection that it was signed before there was an adjournment; I do not know at what stage, but I remember the last thing we did while we were there we signed it before we all left. I have no positive recollection about who of the board of directors were present when it was signed. I could not make a positive statement about whether any of the gentlemen on the board who were present, had left at that time. It seems to me that I knew that some of them had gone probably, but the rest of us were there, and the papers were fixed up, and we signed them.

I have stated that minutes were kept of regular meetings and important meetings. I think there would be minutes kept of a meeting of this kind, but there were a great many meetings and discussions of which probably minutes were not kept. I think this was such a meeting as it was usual to keep minutes of, but I could not say now whether there were any minutes at all or not.

My first impression was that there were nine directors of Oklahoma Trust Company at the time of said meeting, but in naming them over I remember but seven. To the best of my recollection those I have named were present; I could not be very positive about that now. I do not think we ever held a meeting like this without a majority present. It was a contract and we all realized that we had to have a majority of the board to execute it. I do not think there is any doubt but what there was a majority there.

I do not remember anything that would indicate to me that there was anybody of the directors that did not have

full knowledge of this contract after it had been executed and knowledge of the carrying out of the terms of it as I have stated in my direct examination; it was generally discussed and generally known. My recollection is that the rest of the directors did know of it and did agree to it and did carry it out. Sawyer and Litchfield lived at Independence, Kansas; I am not sure that they had any direct knowledge of it, although I am very sure it was discussed with them before the contract was made. I think Mr. Huckleberry made a trip to Independence to discuss it with them, but they were not present at the meeting. But the rest of the directors to my recollection did have knowledge of it.

Mr. Jones was usually more familiar with those matters of the minutes of the meetings than I was and had been there more. He was a great man to use the typewriter. We did not have a stenographer and Jones used his own machine and for that reason he wrote the minutes on his typewriter. The minutes were kept in a stock book, but we pasted those copies in for a minute book. My recollection is it was a custom to sign the minutes before they were pasted in the book, but I have no positive recollection whether the minutes of this meeting were signed. I never examined the minute book to see whether this was pasted in; I do not remember to have ever seen the minutes of this meeting.

I would not sign a contract of this importance and character as cashier of the company unless I know it was agreed upon and understood that the directors wished me to sign it.

#### *Recross Examination.*

I would not have signed the contract unless the board of directors wished me to sign it. I did have authority from that board of directors to sign that contract. I am not sure that the authority was expressed or not, but I am sure I had the consent and knowledge and wishes of the meeting that it should be signed, and that I should sign it. I got that by the meeting and the discussion at the meeting. I do not say there was no motion made authorizing me; I do not recall any definite motion at that meeting. I do not remember that the question of whether or not I should sign it was discussed at that meeting; I was taking it as a matter of course. I took it as a matter of course as cashier that I should sign that contract. Still there might have been express authority from the board for me to sign it; I have no recollection about that. I do not think I depended on any resolution. I just depended on my position as cashier to sign it; that is my position in the matter.

*Examination by the Examiner.*

The contract was signed at the table in the directors' room in the bank. Very likely that was after banking hours; it was an afternoon session and I think probably later than three. I do not know that this meeting was held after banking hours; I do not remember now. I do not remember that I was interrupted or bothered by the outside work, and I usually would have been if it had been during banking hours. I think most of the meeting was held after three o'clock. As I remember, I was present at the entire meeting. After the contract was handed to me for execution I did not consult with any officer of the bank with reference to its execution. I signed it just as it was presented to me without consulting anybody.

*Recross Examination.*

This plan was under discussion for some time, and I am sure Mr. Jones and Mr. Huckleberry were in Independence, Kansas, for the purpose of discussing this contract: I think I remember some correspondence; I am not positive about that. It was under discussion and was mentioned on a trip that Jones and Huckleberry made to Independence. I was not present, but they told me they had talked it over; Jones told me that. I do not know that afterwards when Litchfield found out about this contract he raised a row about it and that Oklahoma Trust Company repudiated the contract and would not stand by it; I do not remember anything about that. I do not remember that afterwards the representatives of the bank notified Mr. Beaty that they would not stand by this contract; I do not know anything about that; that must have been after my time.

*Redirect Examination.*

As to whether or not the contract as drawn and presented to me was in accordance with the contract that the board of directors had authorized me to sign, the best answer I can make to that is that this contract was drawn as a result of that meeting; I could not give the details as to the procedure. This contract was drawn in accordance with the agreements of that meeting.

*Re-Examination by the Examiner.*

As I remember it, all the provisions of that contract were agreed upon by the board of directors at that meeting.

*Redirect Examination.*

I do not now recall from my independent recollection all the terms of that contract, but at the time I signed it I did so understand; I knew the plan and various terms of the agreement.

*Re-Examination by the Examiner.*

I do not know now how carefully I read the contract after it was handed to me, before I signed it. I do not particularly remember reading it.

Also J. C. SIMPSON, a witness introduced by the complainant, testified as follows:

I am the assistant secretary of the Commerce Trust Company of Kansas City. I have held that position I think two and one-half years. My special work is the detail handling of loans, detail work. I have access to the records and files of the company. I remember several loans that Commerce Trust Company made to Oklahoma Trust Company within the past twelve months. (This testimony was taken September 22, 1910.) I would not attempt to say how many such loans were made without looking up the records. I would not even attempt an approximation of the total amount of the indebtedness of Oklahoma Trust Company to Commerce Trust Company at any one time during the past year. By referring to my records I can see what loans were made, by having time enough to look it up. I do not know how long it would take me to ascertain the amount of notes or bills receivable executed by Oklahoma Trust Company which Commerce Trust Company held on January 22, 1910; the records have been closed on all of the direct loans. There is no reason why I could not get the information and furnish it if I am given the time it would take. I am willing to get it and furnish it to the commissioner or the stenographer at a later date, if instructed to do so by Mr. Kemper, president of the trust company, and Judge Robinson, its attorney. I could if given time give a list of collaterals put up by Oklahoma Trust Company with Commerce Trust Company, and which the latter held as security for a loan or loans on January 22, 1910. I am willing to do so if instructed to do so by Mr. Kemper, president of the bank, and Judge Robinson, its attorney. The same answer will apply with reference to furnishing a list of collaterals put up by Oklahoma Trust Company with Commerce Trust Company, and which were held by the latter as security for a loan or loans in force on February 8, 1910. If instructed by Mr. Kemper and Judge Robinson I am willing to make and furnish the commissioner, when this hearing is resumed on October 22, 1910, the lists mentioned, having the same in each instance show the nature of each item of collateral, such as whether a note, bond or stock certificate, and in cases of notes the names of the makers, and in cases of stock or bonds of corporations the name of the corporation, and in each and all cases the date, amount, date of maturity, and such other

details as may be sufficient to accurately describe and identify the item; and also a statement showing the date, amount and maturity of each note or other obligation or evidence of indebtedness executed by Oklahoma Trust Company to Commerce Trust Company during the year 1909 and up to the 8th day of February, 1910, including also dates of credits and payments.

On or about the 22nd day of January, 1910, there was a payment of \$20,000 made to Commerce Trust Company on indebtedness of Oklahoma Trust Company. I think it was made by Mr. McNerney on his indebtedness and we applied it to the payment of a note given Commerce Trust Company by Oklahoma Trust Company of Muskogee. We held McNerney's notes as collateral security at that time; I would not attempt to tell approximately what amount of his notes we held as collateral, because I do not remember the aggregate; it was more than \$20,000, I think. Mr. McNerney was present in person when said payment was made; I would not say that he handed me the draft that made the payment. I have met J. H. Huckleberry; I think he was present. I know Horace Speed; I think he was present. I think that payment was made by a bank draft, and it was either drawn on or by an Indianapolis bank; I would not attempt to say whom it was payable to. I do not know that J. B. Jones was present at the time the draft was handed over to me; Jones was present during that same day, if I remember correctly. I do not know that I had any discussion with Jones about the payment on that day, and I do not know whether he had any discussion with any of the officers of Commerce Trust Company with reference to this matter. I saw Jones that day in Commerce Trust Company, if I saw him at all; I would not say positively, without looking up my memoranda, whether I saw him at all or not.

I do not think Oklahoma Trust Company, or any one for it, made any payment to Commerce Trust Company on the indebtedness of Oklahoma Trust Company on the 8th day of February, 1910. Such payment was made about that date; I think it was about the 11th of the month. I do not know what amount was paid then. I think the balance of the direct indebtedness was paid. I think there was some indirect indebtedness then left unpaid, after this direct indebtedness was paid. If I remember right the indirect indebtedness was discounts of bank certificates of deposit. I think they have not all been paid since then; I think we now have some of those certificates of deposit that are unpaid; I do not know. Commerce Trust Company has not at this time any of the collaterals that were put up by Oklahoma Trust Company



when it paid its indebtedness. The collaterals were turned over to it when it made the last payment, and I think the McNerney collateral was turned over when it made the first payment. When Oklahoma Trust Company made the last payment and the collaterals were turned over, I think they were delivered to Mr. Jones or shipped by express; I would not give a positive answer without looking up the records; I will look that up and give the information when the hearing is resumed, if instructed by Mr. Kemper and Judge Robinson. I think there were some corporate stocks or bonds in the list of collaterals. I think there were ten bonds of \$1000 each of Ontario Pipe Line Company in the list. I do not recollect whether the note of W. H. Rosier was in the list, or notes of one Spaulding. If I remember correctly there were not any notes of Norton, formerly president of Columbia Trust Company. I think there was stock or bonds of Exchange Oil Company in the list, as collateral to some note. I do not remember whether the note of J. E. Tanner was up. I cannot call from memory any of the other collaterals that were up and were delivered. The collaterals we held were held to secure the indebtedness of Oklahoma Trust Company as provided in the note itself; the note itself provides that it is held for. We did not have any collateral agreement in addition to the note. There was not to my knowledge any separate pledged agreement or lien agreement outside of the note. The collaterals were not listed in the note. Originally there was an original list of collaterals furnished; then it was exchanged from time to time, and there was no general list made each time an exchange was made.

I think that about November, 1909, Oklahoma Trust Company made a payment to Commerce Trust Company on its indebtedness of a substantial amount. The first two payments were made on the note, one for \$4000 and one for \$6000; I think it was in either November or December. Just recalling now, I would say these two payments were two or three weeks apart. The amount of the note originally that Oklahoma Trust Company owed Commerce Trust Company was \$50,000. By these two payments it was reduced to \$40,000, and I have stated that manner in which the final \$40,000 was paid. New notes were not given when the \$4000 and \$6000 were paid, but they were simply credited on the old note. The date of the old note was about October 1st, and it was due on demand. Using their figures, I think the collaterals that were put up when the loan was first obtained were about three to one.

I mean by the certificates of deposit that I referred to a few minutes ago that Mr. Jones, representing Oklahoma

Trust Company, said that he held a number of certificates of deposit issued by country banks, payable to some life or fire insurance company, and he wanted to dispose of those certificates and take up the balance of the indebtedness of Oklahoma Trust Company note. That was the way the final balance was paid. I do not remember the exact figures of the total amount or credit Oklahoma Trust Company had with Commerce Trust Company the day it discounted those certificates of deposit, but if I remember right, the difference between the amount of the unpaid balance on the note and the earned interest on the note and the face of the certificates less the discount was about \$175.00; if I remember right said credit was about \$21,700. I do not remember the name of the company those certificates were in favor of, whether it was Mid-Continent Life Insurance Company or not; it was some insurance company. They were time certificates; they have not all matured; none of them have been dishonored. That was the way the payment of February 11th was made.

If the president and counsel of Commerce Trust Company approve I am willing, in addition to information and lists already requested, to furnish the commissioner, when this hearing is resumed, a separate statement, showing with the same particularity and detail requested in connection with the other collateral, a statement showing the collaterals that were pledged or put up with Commerce Trust Company by Oklahoma Trust Company at the time it obtained the \$50,000 loan in October. I will take up with Mr. Kemper and Judge Robinson the matter of furnishing the information and supplying the lists and statements requested of me, and ascertain from them whether or not they are willing for me to do so.

It is my understanding that the entire records of Commerce Trust Company pertaining to bonds, sureties, fidelity bonds, and things of that kind, have been transferred to Globe Surety Company, which took over that part of Commerce Trust Company's business. So far as I have knowledge all said records are gone, pertaining to old business and current business together. The thing that is noticeably absent is the record of the files. They took all the files, the cabinets, and included in those cabinets were the bonds, indemnity bonds, and all that kind of stuff—including the old bonds that had lapsed, as well as the new ones now existing; that is my understanding, that all of those records were transferred.

Going back to the collaterals that were put up to secure the indebtedness of Oklahoma Trust Company, I do not think we had a note of Exchange Investment Company for \$25,000. I think we had two or three small notes of J. H. Bradley; I

do not think we had notes of Genessee Chemical Company for \$9000 and \$4000; I think we had one note of Phillip B. Hopkins, but I do not recall the amount. I do not remember a note of R. N. Eggleston for \$1716. We may have had the \$510 note of R. W. Kellough. I do not think we had notes of Charles H. Shaw for \$3906, \$3937, and \$3000 and some odd. I do not think we had W. R. Roeser's note for \$7533, nor I. N. Putnam, \$7200, nor Thomas H. Owen, a couple of notes for \$5000 and some odd. I do not know about William D. Appleby, \$12,825; I do not remember Robert Jordon, one for \$1000 and one for \$4272. I do not think we had E. F. Cronnin, \$6060. I do not remember M. G. Butler, small notes, \$300 and odd, nor A. C. Reed \$4106.66. I do not think we had American Gas Company \$3399 and \$4326, nor Exchange Oil Company \$25,750, nor Kansas Reduction Company \$3276, \$1560 and \$6673, nor Kentucky Oil & Refining Company \$4635 and \$7956. I do not remember the notes of Landon Investment Company for \$8750 and \$14,287. I do not think we had notes of W. L. Norton for \$28,432.50, \$8487.00, and even \$40,000. I do not think we had a note of James A. Menefee for \$9657.08, nor one of Madison Oil Company for \$5304. I do not think we had note of J. E. Tanner for \$10,000, but I do not remember; I do not think we had a Tanner note. I do not think we had some of the Genessee Banking Company's paper for \$2000 and \$2001.30; if it was made by a bank in New York we did not have it. I do not remember notes of T. B. Higgins and B. R. Brest, \$455.50; we might have had them.

*Cross Examination.*

We held at one time ten bonds, each for \$1000, of Ontario Oil & Pipe Line Company; I do not think we ever had the notes of that company; I do not know when the bonds were surrendered; I am positive that the bonds were not up as collateral to the note when the final payment was made on the note.

*Redirect Examination.*

We can only show the collateral return to Oklahoma Trust Company; we do not know who gets it down there.

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Also it was stipulated and agreed that W. A. Ledbetter was employed by the State Banking Board to defend equity suit 1239, so far as that suit would in any way affect the banking board; and that under this employment he prepared and filed the answer which was filed for the defendants therein, and under this answer made defense and argued the case when it was submitted on September 5, 1911, contending that the

evidence failed to show that Oklahoma Trust Company executed the waiver alleged by the complainant therein, or that any one authorized to execute the same for Oklahoma Trust Company did so, and that Oklahoma Trust Company had never ratified said waiver.

Also it was further shown by the testimony of L. A. Smith and other witnesses, and by the lists and memoranda produced by the different witnesses, that on January 3, 1910, the notes mentioned and described in paragraph IX of the original bill of complaint herein were in the possession of Hamilton National Bank of Chicago, and held by that bank as collateral to secure the payment of an indebtedness of \$50,000 of Oklahoma Trust Company, which indebtedness was assumed by Alamo State Bank, and that when in April, 1910, this indebtedness was paid these notes were released and turned over to said Alamo State Bank; also that the Brest and Bradley notes and the Ontario Pipe Line Company bonds mentioned in paragraph X of the bill of complaint herein, with other securities, were in the possession of Commerce Trust Company of Kansas City, and held by said company to secure an indebtedness of Oklahoma Trust Company for \$40,000, and when the last of this indebtedness was paid in February, 1910, these securities were surrendered and delivered to Alamo State Bank; also that from January 3 to April 18, 1910, Alamo State Bank had a cash balance with Hamilton National Bank of Chicago, the lowest amount of this cash balance being \$16,530.98 on February 12, 1910, until the indebtedness of Alamo State Bank was paid on April 18, 1910, and the cash balance was thereby reduced to \$1841.24; also that when Union State Bank acquired the assets of Alamo State Bank on August 25, 1910, there was on hand in cash \$18,018.58, which was turned over by Alamo State Bank to Union State Bank, besides notes on which Union State Bank has since collected and retained approximately \$140,000.

Complainant further proved that a copy of the motion filed in equity cause 1239 against Alamo State Bank on August 6, 1910, was served on said bank by delivery to its president on said date, accompanied by a written notice that the motion would be presented to Judge Campbell, sitting as the Circuit Court, on September 1, 1910, or as soon thereafter as counsel could be heard.

Complainant further proved that on or about July 26, 1910, he presented his claim to the State Banking Board, as follows:

"Dallas, Texas, July 26, 1910.

"State Banking Board, Guthrie, Oklahoma.

"State Banking Board, Oklahoma City, Oklahoma.

"Gentlemen: Under contracts of January 5 and June 14, 1909, and transfer of December 9, 1909, my client, W. S. Farish, had a lien for more than \$180,000 on certain paving bonds issued to P. J. McNerney and The McNerney Company, of Muskogee, and on the proceeds of such paving bonds, when sold. In the latter part of the year a considerable amount of such bonds were turned over to the Oklahoma Trust Company, which was engaged in the banking business at Muskogee, with its depositors guaranteed under your state law, and that company afterwards sold these bonds and used the proceeds in paying its depositors. The amount thus used, and to which my client was entitled, was \$88,002.31.

"Of the amount stated, \$63,117.85, or about that amount, was thus misapplied in defiance of an injunction of the United States Circuit Court for the Eastern District of Oklahoma made in cause Eq. No. 1239, *W. S. Farish v. P. J. McNerney et al.*, pending at Muskogee, by which injunction the Oklahoma Trust Company was restrained from commingling or confusing the proceeds of said paving bonds with other funds, and was peremptorily required to keep the same separate and apart.

"My client contends that when the trust fund was wrongfully taken and applied to the payment of depositors, who were guaranteed under the state law, he, Farish, became subrogated to the rights of such depositors, and is entitled to resort to the depositors' guaranty fund, and to have you make such assessments as may be necessary to replenish said fund, if it is depleted or from any cause is inadequate to meet this demand.

"If you desire further particulars of the claim, I shall be glad to furnish them, but hardly consider it necessary at this time, as, if I am correctly informed, you already have full knowledge of the matter.

"Please consider this as a formal demand for payment, and let me have your decision as soon as possible.

"Yours very truly,

(Signed) "A. L. BEATY,

"Attorney for W. S. Farish."

It was admitted by the defendants that the State Banking Board has never approved or recognized the claim of the plaintiff herein, in whole or in part, but has resisted, and is now resisting, said claim in its entirety.

Complainant introduced in evidence the petition of E. B. Cockrell, bank commissioner, in the matter of Alamo State Bank, asking for order of sale, filed August 25, 1910, in the District Court of Muskogee County, State of Oklahoma, as follows:

“I.

“Now comes E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and respectfully alleges that the Alamo State Bank is a banking corporation chartered and existing under and by virtue of the laws of the State of Oklahoma, and engaged in the banking business at Muskogee, Oklahoma.

“That said bank has complied with all the requirements of the banking laws of this state, and is entitled to the protection and benefits of the Bank Guarantee Fund provided by the laws of the state.

“II.

“The said E. B. Cockrell, bank commissioner, as aforesaid, further alleges that for some time past said bank has been in bad financial condition, and upon examination of its affairs he has ascertained that it is in a state of insolvency, and on the 25th day of August, 1910, he took possession of said bank, and its records and all of its assets, and now has the same in his possession, custody and control for the purpose of winding up its affairs, as provided in the laws of the State of Oklahoma.

“But he alleges that the Union State Bank, which has recently been organized under the laws of this state, has offered to purchase all of the assets of said Alamo State Bank, and to assume the payment of all the deposits of said bank, and the bills payable of said Alamo State Bank, amounting to the sum of \$25,000.00, upon the condition that the said banking board guarantees the liquidation of the assets of said Alamo State Bank, and pay over to the Union State Bank the sum of Forty Thousand Dollars (\$40,000) as part of the capital stock of said Union State Bank, it being understood that the Union State Bank shall issue its stock for the sum of Forty Thousand Dollars (\$40,000) to be held by the banking board as collateral to secure the reimbursement of the Forty Thousand Dollars (\$40,000) deposited as aforesaid in the Union State Bank.

“And the said E. B. Cockrell, bank commissioner, respectfully alleges and shows that he is informed and believes that the banking board of the State of Oklahoma has accepted said proposition, and has agreed to deposit said sum of money in said bank on the conditions named in the resolu-



tion adopted by said banking board on the 23rd day of August, 1910, a copy of which resolution is hereto annexed marked 'Exhibit A' and made a part hereof.

"Your petitioner further shows that the capital stock of said Alamo State Bank is Forty Thousand Dollars (\$40,000) and that its deposits amount to about the sum of \$411,000.00.

"That the assets of said bank are insufficient to pay off and discharge said liabilities in the ordinary course of banking business, or in the process of liquidation by the bank commissioners, and that unless the arrangement set forth in said resolution of the banking board is carried out, great injury and damage will be caused, and the bank commissioner of this state will be compelled to wind up the affairs of said bank in the ordinary and usual course of liquidations.

"The said E. B. Cockrell, bank commissioner, as aforesaid, respectfully alleges and shows that in his opinion it is to the best interest of all persons concerned for all of the assets of said Alamo State Bank to be sold at private sale to the Union State Bank, on the terms and conditions above set forth.

"Wherefore, said E. B. Cockrell, bank commissioner aforesaid, respectfully prays that this Honorable Court, or the judge thereof in vacation, forthwith make an order directing him, the said bank commissioner, to sell all of the assets of said Alamo State Bank to the Union State Bank in consideration of the payment of One Dollar (\$1.00), and the assumption by the said Union State Bank of all liabilities of said Alamo State Bank to its depositors, amounting to about the sum of \$411,000.00, and that the court make all other and proper orders in the premises."

Also order of court made on the above mentioned petition, as follows:

"On this, the 25th day of August, 1910, came on before me, the undersigned judge of the District Court of Muskogee County, at Chambers, the application of Honorable E. B. Cockrell, bank commissioner of the State of Oklahoma, for an order to sell all of the assets of the Alamo State Bank to the Union State Bank on the condition that the said Union State Bank assume all liability of said Alamo State Bank to its depositors, amounting to about the sum of \$411,00.00, and the assumption of two certain bills payable of the Alamo State Bank, one for the sum of \$15,000, held by C. S. Cobb, trustee, and one for the sum of \$10,000.00, held by Southern Surety Company, and after being fully advised in the premises.

"It is hereby ordered, adjudged and decreed, That said application be, and the same is hereby, granted; and the said

E. B. Cockrell, bank commissioner, as aforesaid, is ordered and directed to sell all of said assets of the Alamo State Bank to the said Union State Bank for and in consideration of the payment by the said Union State Bank of the sum of One Dollar and the assumption by said Union State Bank of all liabilities of the Alamo State Bank to its depositors, said liabilities amounting to about the sum of \$411,000.00, as shown by the books and records of said Alamo State Bank, and the assumption of two certain bills payable of the Alamo State Bank, one for the sum of \$15,000.00, held by C. S. Cobb, Trustee, and one for the sum of \$10,000.00 held by Southern Surety Company; and the said E. B. Cockrell, bank commissioner, as aforesaid, is empowered to execute any and all necessary papers for the purpose of carrying into execution this order."

Also bill of sale made pursuant to the above mentioned order and transcript of minutes of State Banking Board, as follows:

"MEETING OF THE STATE BANKING BOARD.

"Oklahoma City, August 23rd, 1910.

"Members present: State Treasurer Menefee, State Auditor Trapp, Pres. Board of Agriculture Connors, Governor Haskell. In the absence of the chairman, Vice-Chairman Connors presiding.

"*By Governor Haskell.*

"Whereas, the State Bank Commissioner reports to this board the Alamo State Bank of Muskogee is not in condition to continue business without additional capital, and

"Whereas, it is proposed to this board by the Union State Bank, now being organized at Muskogee with a capital of One Hundred Thousand Dollars, that if the assets of said Alamo State Bank are by said commissioner offered for sale with the approval of the District Court or a judge thereof, as provided by law, that said Union State Bank will pay for said assets the sum of One Dollar and the assumption of liability of said Alamo State Bank to all its depositors of every character upon condition that the State Banking Board guarantee the liquidation of said assets of said Alamo State Bank, and it being further proposed that said Banking Board shall pay over to said Union State Bank the sum of Forty Thousand Dollars as a part of the capital of said bank, and for which par in the stock of said Union State Bank shall be issued and delivered to the present stockholders of said Alamo State Bank or any others designated, and which stock assigned in blank will be delivered to said State Banking

Board and held by it to protect it against any payments it may make in pursuance to the foregoing, with the understanding that the persons to whom said stock of the Union State Bank is issued shall have a right to have the same returned to them when the banking board is fully reimbursed for moneys advanced by it and interest that may accrue thereon computed at three per cent, it being expressly understood that none of the things herein done or agreed to be done shall in any way relieve the stockholders of the Alamo State Bank from any liability imposed upon them by the laws of this state.

*"Therefore, Resolved that this board do accept of the foregoing proposition to be by this board done and performed, and direct the secretary and treasurer of this board, each in his respective department, to carry the same into effect and do all things necessary thereto when requested so to do by said bank commissioner and the conditions recited in the foregoing proposition have been complied with by the bank commissioner and the Union State Bank.*

*"By Governor Haskell: I move the adoption of the foregoing resolution.*

*"Members voting 'aye' Haskell, Trapp, Menefee, Connors. Members voting 'nay' none.*

*"Motion carried and resolution adopted.*

*"M. E. Trapp, Acting Secretary. J. P. Connors, Vice-Chairman."*

*"Whereas, on or about the 28th day of August, 1910, the State Bank Commissioner took possession of the assets of the Alamo State Bank and under proper order of the court transferred and sold said assets to the Union State Bank of Muskogee in consideration whereof the said Union State Bank assumed the liabilities of the Alamo State Bank to its depositors and the depositors in said Alamo State Bank were transferred to the Union State Bank; and*

*"Whereas, on or about said date the State Banking Board, by resolution, undertook to guarantee and save harmless the Union State Bank against loss on notes or other securities so purchased from the Alamo State Bank; and*

*"Whereas, a considerable portion of the assets so transferred to the Union State Bank have become involved in litigation in suits now pending in the United States Circuit Court for the Eastern District of Oklahoma; and*

*"Whereas, it was the understanding and agreement between the Union State Bank and said banking board that the*

banking board should save the said Union State Bank harmless and free from all injury in case the said assets of the Alamo State Bank should fail to realize the amount of the debts of the Alamo State Bank assumed by the Union State Bank. This, however, in no way relieves the stockholders of the Oklahoma Trust Company and the Alamo State Bank of their liabilities as stockholders, or otherwise, to said State Bank Commissioner or State Banking Board.

*"Now, therefore, in consideration of the premises and for the purpose of making more definite and certain the resolution heretofore granted, and to carry out the intent and purpose thereof, be it resolved by the State Banking Board:*

*"First. That the State Banking Board hereby pledges itself, and pledges and obligates the State Guaranty Fund created under the laws of the State of Oklahoma for the protection of said Union State Bank against loss by reason of the assumption of liabilities of the Alamo State Bank, and hereby undertakes the defense of said actions in the Circuit Court of the United States in so far as the assets of the Alamo State Bank may be involved and to save said Union State Bank harmless by reason thereof, and agrees that said Union State Bank shall be held harmless by reason of the fact that it has heretofore executed a bond in the sum of \$20,000 providing for the delivery of a certain cash deposit in the sum of about \$18,000 to the plaintiff in said suits in the event the said plaintiff shall establish his right thereto and recover the same in said action. This guaranty, however, and obligation, is subject to the condition that the said Union State Bank shall exercise due diligence in the collection and renewal of all of said notes and assets delivered to it. And that when any part of said assets shall be reported to the bank commissioner by said bank as uncollectable in the regular course of banking business, then in that event the said bank commissioner shall, if he finds the deduction thereof will show a deficiency of assets as compared with the assumed liabilities of said Alamo State Bank and shall certify the amount of said deficiency to this, the Oklahoma State Banking Board, whereupon from the guaranty funds under the control of this board such amount shall at once be deposited in said Union State Bank as a credit upon the guarantee to said bank provided under this contract, and such item of assets may at the option of this board either be taken over by it or left in said Union State Bank, in which event said Union State Bank is obligated to continue all reasonable effort to collect the same, and when any deficiency has been paid by this board, which in the judgment of this board appears to indicate an ultimate loss to the board, the bank commissioner or this*

board, as may be found proper under the law, shall enforce the stockholders liability against the stockholders of said Oklahoma Trust Company or said Alamo State Bank as the facts may warrant."

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Complainant also proved that when the obligation for \$40,000 to Commerce Trust Company was retired there were surrendered to Oklahoma Trust Company or its successor, Alamo State Bank, notes and warrants that were being held as collateral, in addition to those mentioned and described in paragraph X of the bill of complaint herein, to the amount of \$14,236, which have been collected either by Alamo State Bank or by the State Banking Board.

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T. J. COLLINS, a witness introduced by the defendants, testified as follows:

I live at Muskogee, Oklahoma. In July and August, 1910, I was living at Muskogee, Oklahoma. I was one of the original incorporators of Union State Bank, and when it was organized I became cashier thereof and I was one of the directors also. The capital stock of Union State Bank was \$100,000. I participated in the purchase by Union State Bank of certain assets of Alamo State Bank from Mr. Cockrell, the bank commissioner. That purchase was made, I think, August 25, 1910. At the time said purchase was made I did not have any knowledge of the claim that The Texas Company or its assignee, W. S. Farish, had any claim or lien on any assets of Alamo State Bank that were purchased by Union State Bank with reference to where the trade between Union State Bank and the bank commissioner was first discussed as far as I was concerned, I believe I met Mr. Cockrell in the Mid-Continent office in Muskogee. Judge Jackson and myself and others had discussed this among ourselves, though, prior to this time, of course. In no discussion on that subject was any reference made to any claim or lien asserted by the plaintiff Farish or his assignor, The Texas Company. I state that I had no notice whatever of any claim whatever against any of the assets at the time we bought it.

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E. H. HUBBARD, a witness introduced by the defendants, testified as follows:

My name is E. H. Hubbard; residence, Muskogee, Oklahoma. I am not positive, but I think I was one of the original

incorporators of Union State Bank. I became a director in said bank immediately after it was organized. I think Dr. Bennett, Mr. Collins, Judge Jackson, Judge Baker, and E. G. Davis, I believe, and James Huckleberry and myself, I think, constituted the first board of directors; I am not sure whether Mr. Huckleberry was a member of the first board. I knew of the purchase by Union State Bank of the assets of Alamo State Bank. At the time that purchase was made I had no knowledge or notice of any claim or lien by The Texas Company or the plaintiff in this action, the assignee of The Texas Company, against any of the assets of Alamo State Bank that were transferred to Union State Bank; I knew nothing of it.

*Cross Examination.*

I won't say positively when I first learned about the pendency of a suit against McNerney and others involving the disposition of some paving bonds; I knew there was such a suit. I do not think I knew of said suit before Oklahoma Trust Company sold out to Alamo State Bank. I was connected with Alamo State Bank. I am inclined to think the first I knew of the suit that was brought against McNerney involving those paving bonds, in the federal court, was when the suit was filed in the federal court, when the summonses were issued, when the papers were being issued, whenever that date was. I may have had something to do with the service of the papers; I do not know whether I handled them or not; it is barely possible that I saw the papers. At that time I was deputy United States marshal. I suppose the return will show whether I served any of the papers or not. I am not the same person as J. W. Hubbard, whose name is signed to some of the papers. J. W. Hubbard is my brother. I was a deputy in the marshal's office at that time, however, and I knew there was a suit filed. Of course, I did not see the complaint and did not know what it was, any more than we had the papers to serve. I think the extent of my interest in Union State Bank at the time it was chartered was five-hundred dollars. I think the State Banking Board contributed \$40,000 of the capital that Union State Bank started in with.

*Redirect Examination.*

I have no personal knowledge of having served any of the papers in the case referred to on cross examination, and I know nothing definite about the contents of any papers that were served by my brother.

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H. G. BAKER, a witness introduced by the defendants, testified as follows:



My name is H. G. Baker; residence, Muskogee, Oklahoma. I think I was one of the original incorporators of Union State Bank of Muskogee. I became an officer of that company after it was organized; I became a director and vice-president. I know in a general way about the purchase by Union State Bank of certain assets of Alamo State Bank. At the time of said purchase I did not have any knowledge or notice of any claim or lien against any of those assets by The Texas Company or its assignee W. S. Farish.

*Cross Examination.*

I think my interest in Union State Bank when it was organized was \$4,000. I became an officer in addition to being a director; I was vice-president of the bank. I do not know exactly how it was brought about, but my understanding was that originally the State Banking Board provided for \$40,000 of the \$100,000 total capitalization of Union State Bank, and we gentlemen who organized the bank took the balance of the stock and paid it up.

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LEO E. BENNETT, a witness introduced by the defendants, testified as follows

My name is Leo E. Bennett; residence, Muskogee, Oklahoma. I was one of the original incorporators of Union State Bank. I knew of the purchase by Union State Bank of assets of Alamo State Bank. I had something to do with the negotiation of that purchase. It is a pretty hard question to answer straight out as to where the negotiation of that purchase first started, because the first movement was made at Muskogee towards organizing a bank to buy out. I discussed it with Mr. Cockrell, the bank commissioner. I think I first talked, however, with Mr. Collins and Judge Baker and some of their friends. I think first it was talked of at Muskogee and afterwards with Mr. Cockrell and the banking board.

It is a hard question to answer to give the exact facts as to whether at the time of the purchase of the assets of Alamo State Bank I had any notice or knowledge of any claim or lien against those assets by The Texas Company or its assignee, W. S. Farish. As I understood the terms of the purchase arranged, there were certain assets taken from Alamo State Bank which were to go to The Texas Company to satisfy their claim, and as to any other assets, I had no knowledge that they had any claim against any other assets than those taken from the bank at or about that time. At the time Union State Bank purchased the assets of Alamo State Bank I did not know of that claim; I could not say exactly how long it was after that before I found out they had a claim,

but it was some weeks. I knew there had been a claim between The Texas people, or by Farish against Alamo State Bank, the amount of which I did not know exactly, but as I remember it now the impression that I then had and still have was that there were taken from Union State Bank assets sufficient notes and collateral to take care of that suit in case it went against the banking board who was then taking over Alamo State Bank and selling the balance to Union State Bank. During the time of the purchase of Alamo State Bank assets I did not have any knowledge or notice that they claimed any lien, and it must have been nearly five weeks afterwards that I acquired that knowledge. As I remember the date of the purchase, it was about the 25th of August. I left Muskogee shortly afterwards, and I believe I was at Oklahoma City until the first of October and did not learn of it until after I came back; I think it was about the first of October.

*Cross Examination.*

I believe the purchase by Union State Bank was August 25, 1910. It is my recollection that some weeks, say five weeks, after that certain of the notes and other assets were taken away from Union State Bank and put in the hands of Mr. Bailey as trustee, to abide the result of litigation, and that is the taking out I have reference to. My recollection at this time is and has been that a sufficient amount was put in the hands of Mr. Bailey as trustee to take care of claims that were established. I do not mean to be accurate about that or absolutely certain whether the amount was sufficient or not; I do not know whether it was; I just have the impression that remained on my mind. I believe the arrangement under which these assets were put up was reduced to writing, signed up by the parties. I think I signed it for one of the banks, for Alamo State Bank; I am trusting only to my memory now and not to any written record, and I had no notice that this matter would come up until a few moments ago.

I do not remember the details of a transaction at the same time whereby a surety bond was given by Union State Bank for the benefit of the complainant, and where there was some discussion about what companies would be acceptable, and that these bonds covered the cash that was on hand that Alamo State Bank turned over to Union State Bank. There was some transaction of that character, at practically the same time of this taking out that I have referred to.

I did not know on the 18th day of December, 1909, that W. S. Farish filed a bill in equity against McNerney and Oklahoma Trust Company and others. As near as I can fix the date it was about the first week in February of 1910 that I learned of that suit. In the meantime on the 3rd day of

January, 1910, Oklahoma Trust Company had sold out to Alamo State Bank, and I then became president of Alamo State Bank, and in February following, about a month after said deal, I learned of said suit. I remember a notice being served on me by some one in the name of Farish, but I am not sure whose names were signed to the notice, about that time. The notice was in regard to the proceeds of paving bonds which it was claimed by Farish had been disposed of partly with Hamilton National Bank of Chicago and Commerce Trust Company of Kansas City. There was a great deal of discussion with the officers of Alamo State Bank along about that time as to that suit, and what should be done, and what could be done. We regarded it with considerable apprehension of what the outcome might be at that time, for the reason that we had issued an obligation to Hamilton National Bank to pay the \$50,000 on the first of April, and we were fearful that this suit might tie up a part of these funds. The obligation that our bank had issued was to pay a \$50,000 certificate of deposit issued by Oklahoma Trust Company; I do not know when it was first issued; Alamo State Bank had issued said obligation. It was at that time when we learned of this suit on Alamo State Bank certificates. We issued our own certificate. We took up the old one originally issued by Oklahoma Trust Company by our own certificate.

I recall signing some kind of an agreement about the latter part of March, 1910, as president of Alamo State Bank, having reference among other things to the completion of the paving work and what would be done with the proceeds, etc., but just the nature of it I do not remember. I had knowledge at least in a general way of the litigation that was going on, Farish being the complainant and McNerney and others being the defendants.

I do not remember a motion filed in the United States Court where the Farish suit was pending in the summer of 1910, against Alamo State Bank, a short time before the sale of the assets to Union State Bank, the purpose of said motion being to require Alamo State Bank to account for the proceeds of the paving bonds that it had received the benefit of at Chicago in Hamilton National Bank and at Kansas City in Commerce Trust Company, nor a copy being served on me and Alamo State Bank just before this sale; I cannot call that to mind just at this time.

I do not remember the collaterals that were up with Hamilton National Bank to secure said \$50,000 obligation; I might recall some of them if counsel mentioned them; I do not know whether I could identify the list now or not. I believe Ontario Pipe Line Company bonds amounting to \$10,000

were with Hamilton National; the best of my recollection is that Ontario Pipe Line Company bonds were with Hamilton National Bank; I think we had correspondence about the collection of interest; we had papers in both places. I could not say as to \$9500 of the construction notes of Ontario Pipe Line Company being with Commerce Trust Company.

With respect to the note listed in one place as S. C. Pierce and elsewhere as S. C. Pense, I do not remember what is the correct name. There was not a Pense note that I can remember; I do not know a party named Pense, and do not know a party named Pierce; I cannot recall either of those names. As to whether there was a C. R. Rison, I have an indistinct recollection about a name of that kind, but I am not sure.

Alamo State Bank paid the balance on the certificate to Hamilton National Bank in the very early days of April, 1910; that was a very small balance of around a thousand dollars. That might possibly have been the latter part of April; we had quite a little correspondence; it might have been about the middle of April. We asked them finally to draw on us at sight through the First National for the balance. The amount of the indebtedness of Alamo State Bank to Hamilton National Bank on January 3, 1910, at the time it took over the assets of Oklahoma Trust Company, was the full \$50,000; it had not been reduced at that time. Hamilton National Bank, however, owed Oklahoma Trust Company, which Alamo State Bank got credit for, in round numbers, I think, somewhere around \$20,000, deposits standing to its credit. That deposit was owing on the 3rd of January, and Alamo State Bank got the benefit of it in the trade. When the final balance on that obligation was paid the collaterals with Hamilton National Bank were delivered to Alamo State Bank, but I could not undertake to give from memory a list of them. I remember the circumstance that in the fall of 1910, Mr. Beaty, in connection with an auditor named Smith, was in Muskogee, and Judge Ledbetter was in Muskogee, and they were trying to get some information from the records as to what notes had been held by the two banks, the occasion when they took those collaterals or securities out and put them in the hands of Mr. Bailey as trustee. I do not remember to have given Mr. Beaty a list at that time of the notes, but very likely I gave him one if he asked for it; I had the records there at that time and they were accessible, and more than likely I gave him a list if he asked for it; as far as I know they were correct records, as far as the information we had at hand.

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W. C. JACKSON, a witness introduced by the defendants, testified as follows:

My name is W. C. Jackson; I live at Muskogee, Oklahoma. I was one of the original incorporators of Union State Bank. I remember the circumstance of the purchase by the Union State Bank of certain assets of Alamo State Bank; I was not in Muskogee when the detail part of it was done; I came back the day they closed it up; I was away a week or ten days. My recollection is the banking board advanced \$40,000 toward the capital stock of Union State Bank, and I think \$40,000 of the stock was turned over to the banking board. That \$40,000 worth of stock was finally taken up from the banking board by different parties. I suppose the banking board got money for that \$40,000; I do not remember exactly how it did take credit for it. I am frank to admit I do not know whether it is a fact that the banking board let that \$40,000 go towards the performance of its agreement to guarantee the liquidation of those assets; I do not remember; I ought to know but I do not. I was in Muskogee the day they made the court order and closed up the purchase of the assets of Alamo State Bank from the bank commissioner, Cockrell, by Union State Bank. I knew before that time that that was under transaction; I knew it had been talked over. I became an officer and director of Union State Bank; that is the only part that was discussed with me—the officers of the bank. They asked me if I would take the presidency of it, and I agreed to do it, and the officers were discussed; that was the only part discussed; I told them I would take the presidency of it but would necessarily be inactive, because I could not be there.

At the time of the discussion of that transaction or at the time of the purchase I did not know that The Texas Company or its assignee, W. S. Farish, claimed a lien on the assets that were transferred to Union State Bank. I knew that The Texas Company had a claim—I had heard talk of it—against Oklahoma Trust Company, but I do not remember of any claim against those assets that were transferred to Union State Bank, at that time.

I think I acquired \$4,000 stock in Union State Bank.

*Cross Examination.*

I paid for the stock I took in Union State Bank in money. I had heard it talked over, about the suit of Farish against McNerney, that was filed in December, 1909. I was a director in Alamo State Bank. I had not, though, been interested in Oklahoma Trust Company, never was and never knew any-

thing about it. I guess that afterwards questions did come up about the effect that suit would have on Alamo State Bank.

I do not remember the contract about the completion of the paving work. I have no recollection about that at all; I may have known it, but I have no recollection of it. I never read the bill, but I heard in a general way that it was charged in the bill in that case that McNerney had gotten some paving bonds that The Texas Company had a lien on and had sent them out somewhere and disposed of them, and The Texas Company was trying to find out what had become of the proceeds. Prior to the time Union State Bank was organized I knew also that this thing was handled through Oklahoma Trust Company. It is a fact there was a great deal of talk about Oklahoma Trust Company and some of its officers shortly after it sold out to Alamo State Bank. I remember hearing something about Mr. Fink's being appointed receiver in that suit. I may possibly have heard of a motion for contempt being filed against Mr. Jones, president of Oklahoma Trust Company, at the time, but I do not recall it now. That suit involved in a very material way property which Alamo State Bank had acquired from Oklahoma Trust Company, in which property I was interested as a stockholder. All I knew about the suit was common talk or what came to me casually. I had \$5000 stock in Alamo State Bank, and I lost it all.

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CARL PURSEL, a witness introduced by the defendants, testified as follows:

My name is Carl Pursel. I was residing in Muskogee in the months of July and August, 1910. I was one of the original stockholders of Union State Bank; I could not say whether I was one of the original incorporators or not; I think I was, though. I was a director in that bank. I remember the circumstance of the purchase by Union State Bank from the bank commissioner of certain assets of Alamo State Bank. At the time of that purchase or before I did not know anything about, or have any notice of, a claim or lien asserted by The Texas Company, or its assignee Mr. Farish, against the assets that were transferred to Union State Bank. I never heard of any such claim at that time as against those assets.

*Cross Examination.*

I had heard of the suit of Farish against McNerney and others that was pending at Muskogee, read of it in the papers. I had understood that the suit was in reference to some paving bonds that Oklahoma Trust Company or some of its of-



ficers had handled, but I had never read the bill or the pleadings in the case, and I did not know anything except what I had heard or read in a general way.

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FRED DENNIS, a witness introduced by the defendants, testified as follows:

I am treasurer of the State Banking Board. In pursuance of a contract between the banking board and Union State Bank of Muskogee, and in consideration of the assumption and payment of the depositors in Alamo State Bank at the time it was taken into custody and control of the bank commissioner, the Banking Board of the State of Oklahoma has paid to Union State Bank of Muskogee the sum of \$140,300.00, and in addition thereto has issued banking board warrants amounting to the sum of \$46,000.00 which are yet to be paid by the banking board out of the depositors' guaranty fund created under the laws of the State of Oklahoma, and the said sum of \$140,300.00 was appropriated by the State Banking Board out of moneys in its control belonging to depositors of the guaranty fund for the purpose of making the payments mentioned.

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Formal parts of documents, such as captions, as well as signatures and words following signatures, have been omitted in the foregoing statement of facts.

The above and foregoing statement of facts having been lodged with the clerk by the complainant, and the solicitor for the defendants having been notified of such lodgment prior to the 21st day of February, 1914, in which notice there was named a time and place when the court would be asked to approve said statement, the time being at least ten days after the service of such notice, and said time having expired and no objections or amendments having been proposed by the defendants, and said statement having been found correct, the same is hereby approved and made a part of the record in said cause for the purposes of appeal.

RALPH E. CAMPBELL,

*Judge.*

Endorsed: Filed Feb. 21, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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And, to-wit, on the 26th day of December, A. D. 1913, the court filed its Opinion herein, which is in words and figures as follows:

**Opinion.**

CAMPBELL, D. J.:

The Oklahoma Trust Company, one of the defendants in this case, was organized under the laws of Oklahoma, was subject to the banking laws of the state, and its depositors were entitled to the protection against loss afforded by the depositors guaranty fund. The plaintiff's assignor, The Texas Company, had advanced certain funds to the defendants McNerney and McNerney Company, and furnished certain material used in carrying out certain street paving contracts which McNerney or the McNerney Company had with the City of Muskogee. In order to secure to The Texas Company reimbursement for the funds and material so advanced, McNerney and McNerney Company had assigned to The Texas Company certain paving bonds issued, or to be issued, by the city in payment for such paving. The Oklahoma Trust Company which at the time of said assignment also had some claim against McNerney and the McNerney Company, manifested its consent to the assignment of said bonds by appending its written agreement to said assignment contracts, to the effect that any pledge or lien it might have or might acquire should be subordinate to the rights of The Texas Company under said contracts of assignments, with the further provision that "it hereby contracts with The Texas Company to buy and pay for all bonds issued under said paving contracts at ninety cents on the dollar of their par value, same to be accepted and paid for within five days after they are tendered." Subsequently certain bonds were issued in the city and sold by the Oklahoma Trust Company, the proceeds of which, in the sum of \$25,351.63, under the foregoing agreement it was obligated to pay to The Texas Company. Before payment, however, McNerney and the McNerney Company made claim to this fund, denying the right of The Texas Company thereto, and pending the controversy the Oklahoma Trust Company deposited the same in its banking department to its credit as trustee. While this deposit so remained and in the latter part of December, 1909, the Oklahoma Trust Company, which for sometime had been in a failing condition, was taken in charge by the state bank commissioner as an insolvent institution, and, on January 3d, 1910, under the direction of the bank commissioner, the said trust company sold its banking business to the defendant Alamo State Bank, the said Alamo State Bank assuming and undertaking to pay

on demand most of the deposits of the said Trust Company, but especially excepting therefrom the above-mentioned deposit standing in the name of the trust company as trustee. It is now determined that the fund constituting this deposit should have been paid over by the trust company to The Texas Company, under the above-mentioned contracts, and that it might justly and equitably be treated and considered as a deposit of The Texas Company, and The Texas Company a depositor with the trust company, as contemplated in the depositors guaranty fund legislation herein referred to.

Another amount involved is the sum of \$21,252.40, which was deposited to the credit of the Trust Company with the Hamilton National Bank of Chicago. This fund originated from a sale of paving bonds by one Merrell Moores, acting for the Trust Company. The proceeds of these bonds under the terms of the contracts above-mentioned, also belonged to The Texas Company; but in violation of an injunction of this court, the Trust Company caused to be applied to the payment of certain of McNerney's notes, which it held, the sum of \$21,252.40 out of such proceeds, which sum it deposited to its own credit, as above stated, on December 31, 1909. When on January 3, 1910, it sold its banking business to the Alamo Bank, this credit was one of the assets transferred, and \$18,823.12 of this credit was applied by the Alamo Bank to the payment of an indebtedness of the Trust Company, due the Chicago bank, which the Alamo Bank had assumed, and to secure which certain notes of the Trust Company had been pledged to the Chicago bank. These notes, subject to the lien of the bank, had also been included in the transfer to the Alamo Bank, and, pending payment of the indebtedness to the Chicago bank, these notes were delivered to the Alamo Bank. The contention of the plaintiff as to this fund is thus stated in counsel's brief:

"Complainant here insists, (1) that, because the bank commissioner, as the representative of the State Banking Board, requested and demanded that the Oklahoma Trust Company transfer its assets to the Alamo State Bank, including in the transfer the \$21,252.40 then in the Hamilton National Bank and equitably belonging to the complainant, and because this transfer was the means and plan adopted under the direction of the bank commission to liquidate the affairs and pay the depositors of the Oklahoma Trust Company, the State Banking Board is liable as in tort for the entire amount; (2) that even if the transfer and appropriation of this \$21,252.40 had not been under the direction of the representative of the State Banking Board the same result would ob-

tain, because this trust fund was used as far as it would go to induce and compensate the Alamo State Bank to pay depositors of the Oklahoma Trust Company to the amount of \$448,585.37, which depositors the State Banking Board otherwise would have been compelled to pay, thus subrogating the complainant to the rights of those depositors and entitling him to demand and collect the \$21,252.40 from the State Banking Board; and (3) that a portion of this identical fund, namely, the sum of \$18,823.12, having been used to discharge a lien on certain specific securities, the complainant is subrogated for that amount to the lien so discharged, and there is no merit in the plea of *bona fide* purchase."

Of the proceeds of the bonds sold by Moores, as above stated, there was the further sum of \$20,000 which was applied to the payment of an indebtedness due from the Trust Company to the Commerce Trust Company of Kansas City, by which certain collaterals held by the Commerce Trust Company as security were released and passed to the Alamo State Bank under the terms of the transfer of January 3d, 1910. Certain of these collaterals are now by agreement of parties impounded in the hands of a custodian, pending the determination of this cause, and the remainder have been disposed of by the Alamo Bank. It is the contention of the complainant that as to these collaterals, his assignor, The Texas Company, was subrogated to the rights of the Commerce Trust Company, as pledgee, and entitled by such subrogation to the possession of these collaterals now in the hands of the custodian, or their proceeds, to apply toward the repayment of the Texas Company's money so wrongfully applied by the Oklahoma Trust Company toward the payment of its indebtedness to the Commerce Trust Company, whereby these collaterals were released by the latter company. The remainder of these collaterals not so impounded, the Alamo bank has realized upon. Plaintiff contends that inasmuch as the proceeds of such collaterals were either used by the Alamo bank in payment of depositors of the Trust Company, or formed a part of the consideration for said payment, passing to it from the Trust Company, plaintiff's assignor, The Texas Company, was entitled to the rights of a depositor as against the Alamo Bank and the State Banking Board.

The Alamo State Bank received \$20,000 more of the funds realized by the sale of bonds by the Trust Company, a portion of which was placed by the Trust Company to the credit of the Alamo Bank in the Commerce Trust Company of Kansas City, and the remainder first placed to the credit of Mc-Nerney and by him used to take up his note held by the Alamo

Bank. On August 25th, 1910, when the Alamo Bank closed and its assets were sold by the Bank Commissioner to the Union State Bank, it held on hand \$18,012.58 in cash which was turned over to the Union State Bank. As there is no proof that between the date when the Alamo Bank received this \$20,000 and August 25th, 1910, its amount of cash was less than \$18,012.58, complainant contends that he, as assignee of The Texas Company, is entitled to apply this cash item to his reimbursement by an award against the Union State Bank, and, if any deficiency, or if the entire amount of the cash fund is not subjected, he have judgment against the State Banking Board, "it having received the benefit of the entire \$20,000 received by the Alamo Bank, under the transfer of January 3d, 1910, and operated pro tanto in the assumption and payment of depositors."

Counsel for complainant in his brief says: "Complainant intends to dismiss without prejudice as to the individual defendants who compose the State Banking Board, retaining the board, as a board, and the other defendants." Does the State Banking Board, which is sued in its official capacity, so represent the State of Oklahoma as a mere agency of the state, as that this, while a suit against the board, in which the state is not nominally a party, is in effect a suit against the state, a suit in which the state, so far as the recovery sought against the board is concerned is the real party in interest? This is the contention made by counsel for the State Banking Board, claiming for the board the immunity against suit afforded by the Eleventh Amendment to the federal constitution. When this question was presented by the demurrer interposed on behalf of the State Banking Board at an earlier stage of this proceeding, the court ruled against the contention that it is in effect a suit against the state, and permitted the case to proceed to final hearing. By agreement of counsel at the close of the taking of testimony by the examiner, the case was submitted upon the record, upon briefs of counsel, without oral argument. In the briefs is again raised the question as to whether it is in effect a suit against the state, and the question has been very fully briefed by counsel upon both sides.

By section 1 of Art. XIV of the Oklahoma Constitution it is provided that the legislature shall enact general laws providing for the creation of a banking department to be under the control of a bank commissioner appointed by the governor by and with the consent of the senate, with sufficient power and authority to regulate and control all state banks, etc., under laws which shall provide for the protection of depositors and individual stockholders. Pursuant to this provision, the legislature has provided for a state banking board.

By amendment of the original act, the personnel of the board has been changed, but its powers and duties are not affected so far as relates to this enquiry. It is provided that "said board shall have supervision and control of the depositors' guaranty fund \* \* \* and shall have power to adopt all suitable rules and regulations, not inconsistent with law, for the management and administration of the same." The guaranty fund is raised by an assessment from time to time of a certain per cent of average daily deposits upon the several state banks and trust companies organized under the banking laws of the state, and, in addition, certain emergency assessments when occasion may require. It is further provided that if the amount realized from such emergency assessments shall be insufficient to pay all the depositors of all failed banks having claims against the guaranty fund, the said banking board shall issue and deliver to such depositors interest bearing certificates of indebtedness, consecutively numbered, payable upon call of the State Banking Board, as state warrants are paid by the state treasurer, in the order of their issue, out of the emergency levy therefor made. It is further provided that "as rapidly as the assets of failed banks are liquidated, and realized upon by the bank commissioner, the same shall be applied, first, after the payment of the expenses of liquidation, to the repayment to the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed banks, and shall be applied by the State Banking Board toward refunding any emergency assessments levied by reason of the failure of such liquidated bank." Provision is also made for the appointment of a bank commissioner, and it is further provided that whenever the bank commissioner shall become satisfied of the insolvency of a state bank or trust company, he may, after due examination of its affairs, take possession of such bank and its assets, and proceed to wind up its affairs. It is further provided that in the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company, is insufficient to discharge its obligations to depositors, the State Banking Board shall draw from the depositors' guaranty fund \* \* \* the amount necessary to make up the deficiency, and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers, and directors of said bank or trust company, and against all other persons, corporations or firms. Such liability may be enforced by the state for the benefit of the depositors' guaranty fund.



In *Noble State Bank v. Haskell*, 219 U. S. 109, this act is summarized as follows:

"This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's daily average deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund."

In the case last cited, the Supreme Court holds that this legislation is an exercise, and a proper exercise, of the police power of the state, and the court say:

"If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke, to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand."

It is seen, therefore, that the act is an exercise of the police power of the state, and has for its accomplishment the purpose and policy of the state, as evidenced by the legislation, "to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand." In effectuating this purpose and policy the bank commissioner and State Banking Board are but the agents of the state. In fact, that is the only way that the state, as a political corporate body, can act. *In re Ayres*, 123 U. S. 501. The protection of depositors contemplated by the act is a protection extended by the state, as we have seen, in the proper exercise of the police power. In order to effect this protection a fund, known as the guaranty fund, is raised by assess-

ing state bank institutions. This fund does not pass to the state treasurer, as do most other state funds, but is subject to the supervision and control of the State Banking Board. In relation to this fund, the Supreme Court of Oklahoma, in *State v. Cockrell*, 112 Pac. 1000, has said:

"That the Bank Commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund, is also true. The depositors' guaranty fund act was sustained by this court on the theory of the reserve power of the state to alter and amend charters of state banking corporations for the public welfare of the people of the state. \* \* \* This power exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state \* \* \* equal to five per centum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks (section 3, article 2, c. 5, pp. 121-123, Sess. Laws, 1909), is the same as that which levies, or causes to be levied, a tax upon the people and property within the state for the maintenance and support of the common schools and educational institutions. The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose."

Whether that decision be binding upon this court in this case or not, I think the conclusion sound that the bank guaranty fund in the hands of the State Banking Board is a part of the funds of the state, to be used, it is true, only for the specific purposes for which it is assessed, and that the board's payment from this fund to depositors of failed banks is in effect the state making such payments. The theory upon which complainant seeks to recover from the State Banking Board is that as to a part of the recovery sought; The Texas Company was a depositor of the Oklahoma Trust Company, and entitled to demand payment as such from the State Banking Board, the Trust Company having become insolvent and the Bank Commissioner having taken it in charge for that reason and brought about the transfer to the Alamo bank. As to the remainder of the recovery sought, the theory is that

because funds belonging to The Texas Company and not the Trust Company, were under the direction of the Bank Commissioner transferred to the Alamo Bank, and used by it in the payment of certain depositors of the Trust Company, who but for payment by the use of such funds would have been entitled to demand payment from the Banking Board, therefore, the plaintiff, who has succeeded to the rights of The Texas Company, is subrogated to the rights of such depositors to demand payment from the State Banking Board.

This presents the question whether a depositor of an insolvent bank, of which the bank commissioner has taken charge, and the cash assets of which are insufficient to pay depositors, can maintain an action in this court against the Banking Board to enforce the payment of his deposit from the bank guaranty fund. If in such a suit the state, though not nominally a party, is a real party in interest as defendant, then it must follow that the case falls within the prohibition of the Eleventh Amendment. *In re Ayres*, 123 U. S. 505. In *Pennoyer v. McConnaughty*, 140 U. S. 1, where many former cases of the Supreme Court relative to this question are reviewed, it is said:

"The question, then, of jurisdiction is first presented for determination. Is this suit in legal effect one against the state, within the meaning of the Eleventh Amendment to the Constitution? A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication, and as might naturally be expected in view of the important interests and the wide-reaching political relation involved, the dissenting opinions have been numerous. Still the general principles enunciated by the adjudications will, upon a review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon.

It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state without its consent, even though the sole object of such suit be to bring the state within the operation of the Constitutional provision, which provides that: 'No state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against the state itself.

In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is where the suit is brought against the officers of the state as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. *In re Ayres*, 123 U. S. 443; *Louisiana v. Jumel*, 107 U. S. 711; *Antoni v. Greenhow*, 107 U. S. 769; *Cunningham v. Macon & Brunswick R. R.*, 109 U. S. 446; *Hagood v. Southern*, 117 U. S. 52.

The other class is where a suit is brought against defendants, who claiming to act as officers of the state and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or form compensation in damages, or in a proper case where the remedy at law is inadequate, for an action to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial,—is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn v. Bank of the United States*, 9 Wheaton 738; *Davis v. Gray*, 16 Wall. 203; *Tomlinson v. Branch*, 15 Wall. 460; *Litchfield v. Webster County*, 101 U. S. 773; *Allen v. Baltimore & Ohio R. R.*, 114 U. S. 311; *Board of Liquidation v. McComb*, 92 U. S. 531; *Poindexter v. Greenhow*, 114 U. S. 270."

After reviewing a number of decisions of the Supreme Court, in which suits against state officers individually were held not to be in effect suits against the state, it is further said in this case:

"The dividing line between the cases to which we have referred and the class of cases in which it has been held that the state is a party defendant, and, therefore, not suable by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham v. Macon & Brunswick R. R.*, where it was said, referring to the case of *Davis v. Gray*, *supra*: 'Nor was there in that case any affirmative relief granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of the company.'

109 U. S. 453-454. Thus holding, by implication at least, that affirmative relief would not be granted against a state officer by ordering him to do and perform acts forbidden by the law of a state, even though such law might be unconstitutional.

The same distinction was pointed out in *Hagood v. Southern*, which was held to be in effect a suit against the state, and it was said: 'A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law, or suits in equity are maintained against defendants, who, while claiming to act as officers of the state, violate and invade the personal property rights of the plaintiffs under color of authority unconstitutional and void.' 117 U. S. 52-70."

Referring to *In re Ayres*, 123 U. S. 443, which is reviewed, it is further said in relation to that case:

"In delivering the opinion of the court, Mr. Justice Matthews, referring to the class of cases in which it had been adjudged that the suit was against state officers in their private capacity, and not against the state, said:

"The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. \* \* \* This feature will be found on an examination to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a state or of the United States, where the objection has been interposed that the state was the real defendant, and has been overruled.'" 123 U. S. 500-501.

In *Smith v. Reeves*, 178 U. S. 436, the receivers of a railway company sued the defendant as treasurer of the State of California, in the Circuit Court for the Northern District of that state, to recover certain taxes, which it was alleged had been illegally assessed against the railway company, and which had been theretofore paid. The state law provided that any person who, having paid his taxes, was dissatisfied with the assessment, might, subject to certain conditions, bring an action against the state treasurer for the recovery of the amount of the taxes so claimed to have been illegally assessed, subject to the right of the treasurer, if suit was brought in some other court, to demand that the action be tried in the superior court of the County of Sacramento. Provision was made for

payment of any judgment obtained in such suit, etc. It was held in the case that the provision of the state law authorizing suit against the treasurer amounted only to consent on the part of the state that such suit might be brought in the state courts, and did not amount to consent to such suits in any United States court. The point was made in this case that it was in effect a suit against the state, and as to this the court said:

“Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against the officer in his official capacity; and the judgment would compel him to pay out of the public funds in the treasury of the state, a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S. 204, 221, and authorities there cited. In the present case, the action is not to recover specific moneys in the hands of the state treasurer, or to compel him to perform a plain ministerial duty; it is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act, to the injury of the plaintiffs in their persons or property; but one to compel the state, through its officers, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

“The case in some material aspects is like that of *Louisiana v. Jumel*, 107 U. S. 711. That was a proceeding by mandamus against officers of Louisiana, to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations, and directed its officers not to pay. The court



say: 'It may be without doubt easily ascertained from the accounts how much of the money on hand is applicable to the payment of these debts; but the law nowhere requires the setting aside of this fund, any more than others, from the common stock. In the treasury all funds are mingled together and kept so until called for to meet specific demands. The remedy sought in order to be complete would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal, and interest were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place. When a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion to grant the relief asked for in either of these cases would be to exercise such a power.'

"We are clearly of opinion that within the meaning of the constitutional provisions, relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself. *In re Ayres*, 123 U. S. 443; *Pennoyer v. McCaughy*, 140 U. S. 1-10."

In *Louisiana v. Jumel*, *supra*, it is said:

"The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax-collectors and paid over to him, that is to say, into the state treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the state. If there is any trust, the state is the trustee, and unless the state can be sued, the trustee cannot be enjoined. The

officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the state, but not the state through them.

"In this connection there is much that is instructive in *Reg. v. Lords Commissioners of the Treasury*, Law Rep. 7 Q. B. 387. There money had been appropriated by Parliament for the payment of costs of a particular character, and an application was made for a mandamus to compel the Lords Commissioners of the Treasury to pay certain bills which had been properly taxed; but although the court was emphatic in its declaration that payment ought to be made, the writ was refused because the Lords Commissioners held 'the money as the servants of the Crown, and no duty was imposed upon them as between them and the persons of whom the money was payable.' Lord Chief Justice Cockburn, in his opinion, said (p. 394): 'Though I quite agree that according to the appropriation act they (the Lords Commissioners) were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown; because in that character they have received the money, and in no other.' And Blackburn, J. (p. 399): 'It seems to me that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants.' So, here, the obligation is all on the state, to be discharged through its servants, and the money is held by the officers proceeded against in their character as servants of the state, and no other."

In *Murray v. Wilson Distilling Company*, 92 C. C. A. 1, it is said:

"Undoubtedly the Eleventh Amendment was intended to prevent a federal court in suits prosecuted by citizens of another state or subjects of a foreign state from interfering with a state in the preservation of its autonomy in maintaining its own system of self-government so long as such system is in harmony with the Constitution of the United States. To this end, therefore, the funds of

the state in its treasury, or held by its officers or agents, for use in the administration of the governmental affairs of the state, are not to be affected by the process of the federal court, nor can such court entertain jurisdiction of an action which has for its purpose an investigation of the right of the state to manage and control its internal affairs; or of an action which will obstruct the state authority or impair the state instrumentalities in the discharge of legitimate functions in the maintenance of the state's integrity. To be more concise: The exceptional inhibition is to the effect that the courts of the United States cannot entertain jurisdiction in an action at the instance of a citizen, first, which seeks to recover against the state the property belonging to the state, or the purpose of which is and the result of which would be to disturb the legal and orderly administration of the state's internal and governmental affairs by its bonded officers and agents."

In this case, involving a state of facts somewhat analogous to the case at bar, the Circuit Court of Appeals, for the Fourth Circuit, held that the suit against the Commissioners to wind up the State Liquor Dispensary of South Carolina was not in effect a suit against the state, but the Supreme Court reversed this decision, holding the suits to be against the state. *Murray v. Wilson Distilling Co.*, 213 U. S. 151.

While on the demurrer I was of a different opinion, after careful consideration of all the authorities presented by counsel for both sides, I am forced to the conclusion that so far as the recovery of a money judgment sought against the Banking Board finally is concerned, it is in effect a suit against the state. The plaintiff seeks a decree adjudging him to have the right of a depositor, such as the bank guaranty fund legislation of the state is designed to protect, fixing the amount of his recovery as such, and compelling the State Banking Board to pay the same out of the bank guaranty fund, and, if necessary, to make special assessments against the several state banks. If, as I conclude, the Bank Guaranty Fund is a fund belonging to the state in the custody and control of which the members of the State Banking Board are merely the agents of the state in disbursing this fund to depositors, thereby representing the state in effectuating its policy and purpose, as evidenced by the bank guaranty legislation, it follows, under the foregoing authorities, that a suit by a depositor against the board to enforce the payment of his deposit in a failed bank out of the bank guaranty funds, is in effect a suit against the state.

Counsel for plaintiff rely strongly on *Rolston v. Missouri Fund Commissioners*, 120 U. S. 390. In that case the state had loaned its credit in the shape of state bonds to a railway company, the company to pay the current interest on the bonds and also principal when due. Later, by act of the legislature, the railway company was authorized to issue its own bonds, and pay the proceeds thereof into the state treasury, sufficient to cover the amount for which the state was obligated upon such outstanding state bonds. Upon making such payment it was made the duty of the governor to make over, assign, and convey to the trustees in the mortgage securing the railway company's bonds, the statutory lien of the state arising out of its issuance of its bonds in the first instance. This was a suit by the trustees, alleging that on behalf of the railway company they had paid the state treasurer the full amount for which the state was obligated upon its bonds, and seeking to enjoin the sale of the railroad's property in satisfaction of the lien claimed by the state, and to enforce the assignment to them by the governor of the state statutory lien. The point was made by the defendant that this was a suit against the state, but the court holds against this contention.

I find it difficult to entirely harmonize the above case with earlier and later decisions of the Supreme Court on the point involved, but in view of authorities heretofore cited, I cannot find in that case authority for holding in the present case that the recovery urged against the Banking Board is against them as officers and not against the state. As I view this case, it represents a situation more nearly analogous to *Murray v. Wilson Distilling Co.*, and *Smith v. Reeves*, *supra*. In the case of *Huidekoper v. Hadley*, 171 Fed. 1, also relied upon by plaintiff, there was involved the question as to whether a suit against the Board of Equalization of the State of Missouri to enforce by mandamus the discharge of a plain official duty with regard to equalizing the valuation of property of the state for taxing purposes was in fact a suit against the state. And it was held not to be such. But the present case in my judgment involves more than that.

What has been said heretofore has relation only to the question of the right of the complainant to recover from the State Banking Board in virtue of the status of The Texas Company as a depositor, either directly or by right of subrogation. When we come to the question of the plaintiff's right to the impounded collaterals, now constructively in the possession of the court, or the cash item held by the Union State Bank, a different case is presented. The fact that the state may claim a lien upon that does not divest the court of

jurisdiction to determine the rights of the contending parties, and enter decree accordingly. *Cunningham v. Macon R. R.*, 109 U. S. 446.

Taking first the \$21,252.40 realized by the Oklahoma Trust Company from the sale of bonds and which it deposited in The Hamilton National Bank of Chicago on December 21, 1909. This fund belonged to The Texas Company under the assignments from McNerney and McNerney Company, ratified by the Trust Company. It should have been paid to The Texas Company, or its assignee, the plaintiff, and its deposit by the Trust Company to its credit with the Hamilton National Bank was in direct violation of the court's order. In the hands of The Hamilton National Bank it still remained the fund of The Texas Company or its assignee. It is, however, contended that the Alamo Bank was an innocent purchaser, in good faith, for value and without notice, of this fund. But this defense is not supported by the proof. It does not appear from the evidence that at the time of the transfer of assets of the Trust Company to the Alamo Bank, on January 3, 1910, the Alamo Bank did *not* have notice of the interest of The Texas Company or the plaintiff in this fund. It further appears that in February, 1910, long before the Alamo Bank had completed paying the depositors of the Trust Company (and this was the consideration for the transfer to it of the Trust Company's assets), the plaintiff notified the Alamo Bank of his interest in this fund. Now with such knowledge of the interest of the plaintiff in this fund, a portion of it was applied to the payment of \$50,000 originally due from the Trust Company to the Hamilton National Bank and later assumed by the Alamo Bank. It appears in proof that the lowest daily credit balance in the Hamilton Bank in favor of the Alamo Bank, between January 3rd, 1910, and April 18th, 1910, when this indebtedness was paid, was \$16,530.98 on February 12th, and this credit balance was used, so far as it would go, toward paying the \$50,000. It follows that at least \$16,530.98 of the plaintiff's money was used in this payment, which operated to release the collaterals held by The Hamilton Bank and now in dispute. Thereby the plaintiff was subrogated to the rights of The Hamilton Bank as pledgee of this collateral, to the extent of this \$16,530.98. If the state ever acquired any lien on this collateral as a part of the assets of either the Trust Company or the Alamo Bank, its lien did not attach until long after it had been pledged as above stated and while it was so pledged, and the rights of the pledgee are obviously paramount to any the state might have acquired. It follows that the complainant, as successor in interest to The Texas Company, is entitled to the possession of such of this collateral,

or the proceeds thereof, as is now in the hands of DeRoos Bailey, trustee, to be applied to the satisfaction of his claim against the Trust Company, to the extent of \$16,530.98, unless it be the three notes claimed by the Union State Bank, and that bank's contention will be considered further on.

Of the proceeds of the bonds sold by Moores, as heretofore stated, \$20,000 was paid to the Commerce Trust Company, of Kansas City, and applied to an indebtedness of the Oklahoma Trust Company there, for which there was pledged certain collateral. By the payment of this indebtedness, this collateral was released. To the extent of \$20,000, the plaintiff was subrogated to the rights of the Commerce Trust Company, as pledgee of this collateral. Neither was the Alamo Bank an innocent purchaser of this collateral. Nor does the fact that pursuant to the state banking laws a part of this collateral was sold under order of court, to the Union State Bank, eliminate the question as to whether the Union State Bank was an innocent purchaser for value without notice. The court order contemplates a sale of the Alamo Bank's assets. If included in that property there are items upon which third persons have a valid lien or claim of any character, the order could not have the effect of divesting that. The assets are sold as they are, and the title which the purchaser acquires is determined by the same rules as if it had been a voluntary transaction, without the intervention of the court order. The consideration passing from the Union State Bank for the purchase of the assets of the Alamo Bank, including the collaterals and the fund in controversy, was its promise to pay the deposits of the Alamo Bank. But within just a few weeks after this transfer was made, and long before the deposits had been paid in full, the Union State Bank had explicit and positive notice of the complainant's claim, as evidenced by the agreement under which the custodian took charge of the collateral and the bonds which the Union State Bank executed as to the cash fund. The defense of innocent purchaser is an affirmative defense. It must appear that the purchase was in good faith, for a valuable consideration, and that the consideration was paid before notice of plaintiff's claim. *Johnson v. Ga. Loan & Trust Co.*, 141 Fed. 593, and authorities cited; 35 Cyc. 345, *et seq.*, 24 Am. & Eng. Enc. 1171. Under these authorities, the Union State Bank has not made out a case of bona fide purchaser, even if that defense is permissible as against the plaintiff in this case.

But a bona fide purchaser is not protected as against the claim of the true owner, where the seller has obtained possession of the property by wrongful acts, if without any delivery by or consent on the part of the owner. 35 Cyc. 361. The plaintiff was entitled to the proceeds of the bonds sold



by Moores. Equitably these funds, less a small commission and expense, belonged to the plaintiff. By order of this court, McNerney and the Oklahoma Trust Company had been enjoined from commingling or confusing these funds with any other funds, and required to keep them separate and apart, "so that no creditor of said Oklahoma Trust Company, other than the plaintiff and others interested in said bonds, will have any claim thereon." Disregarding this order, and with no more right to do so than if they had stolen them, McNerney and the representatives of the Trust Company, in flagrant violation of this injunction, proceeded to treat these funds as their own and so dispose of them as to defeat if possible, the complainant's claim to them. They passed from plaintiff's control by no act of his, but in spite of the utmost vigilance to hold them. He has a right to follow these funds, or their fruits, so long as they may be traced and identified.

Besides the collateral referred to, the Alamo Bank received \$20,000 of the proceeds of these bonds, in payment on certain of McNerney's notes which it held. This was also a part of the proceeds of the bonds wrongfully disposed of by the Trust Company. When the transfer of the assets of the Alamo Bank was made to the Union Bank, it included an item of \$18,018.58 cash then on hand. It does not appear that at any time between the receipt of the said \$20,000 and the date of the transfer to the Union State Bank, the cash in the Alamo Bank was less than the said amount on hand at the time of said transfer. A careful reading of the record convinces that when it received this fund, the Alamo Bank, through its officers, had notice or information sufficient to put it upon enquiry, which, if reasonably exercised, would have apprised it of the fact that this money equitably belonged to the plaintiff. It cannot be said to have come in possession of this fund as a bona fide purchaser for value without notice. In the absence of evidence to the contrary, the presumption is that the \$18,018.58, turned over to the Union Bank, was a part of this fund. *National Bank v. Insurance Co.*, 104 U. S. 54. The funds being traced to the Union State Bank, which, for the reasons already stated, cannot be deemed an innocent purchaser thereof, complainant is entitled to recover this fund also. Decree may enter denying relief as against the State Bank Commissioner and Banking Board, but awarding the complainant the possession of the collaterals, or the proceeds, now in the hands of the custodian, and against the Union State Bank, for the sum of \$18,018.58.

RALPH E. CAMPBELL, Judge.

Endorsed: Filed Dec. 26, 1913, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

And, thereafter, to-wit, on the 21st day of February, A. D. 1914, the following decree was made and entered in this cause.

### Final Decree.

On this the 21st day of February, 1914, this cause came on for final decree. The complainant announced that he would no further prosecute his suit against C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, in their individual capacities, and without prejudice dismissed the same as against them individually, retaining, however, among other defendants, the State Banking Board, sometimes referred to as the Banking Board, of the State of Oklahoma, as to which the suit was not dismissed. Whereupon, as to the parties remaining before the court, the evidence adduced having been considered, and the cause having been argued by counsel, it was ordered, adjudged and decreed by the court:

### First.

That to secure him in the payment of a portion, to-wit, the sum of \$16,530.98, with interest thereon at the rate of 6% per annum from the 18th day of April, 1910, of a certain decree for money rendered by this court in equity cause 1239, on the 5th day of September, 1911, and all costs of this suit, complainant, W. S. Farish, has a lien, which is hereby foreclosed as against each and all of the defendants, upon those certain notes mentioned and described in paragraph IX of his original Bill of Complaint in this cause, and on the proceeds of such of said notes as have been collected, said notes being more particularly described as follows:

Number.	Name of Maker	Amount
5250	C. R. Rison .....	\$1,330.00
5296	J. R. Edrington .....	755.00
5334	S. C. Pense .....	365.00
5039	Lelia A. Holt .....	2,000.00
5406	Jno. C. Clemons .....	827.00
802	W. H. Roeser .....	2,436.01
612	J. Cargile .....	1,537.50
748	Genessee Chemical Company .....	4,590.00
5248	W. H. Barnes .....	7,500.00
829	S. G. Reed .....	4,106.66
5407	Jno. M. Lesley .....	575.00
430-432, 441	Ontario Pipe Line Company .....	9,500.00

### Second.

That to secure him in the payment of another portion, to-wit, the sum of \$20,000.00, with interest thereon at the rate

of 6% per annum from the 22nd day of January, 1910, of said decree for money so rendered by this court in said equity cause 1239 on the 5th day of September, 1911, and all costs of this suit, said complainant has a lien, which is hereby foreclosed as against each and all of the defendants, on the notes and bonds described in paragraph X of his said Bill of Complaint, and on the proceeds of such of said notes and bonds as have been collected, said notes and bonds being more particularly described as follows:

Number.	Name of Maker	Amount
433	D. R. Brest .....	\$ 455.50
669	J. H. Bradley .....	1,910.67
	Ten Ontario Pipe Line Company Bonds.....	10,000.00

### *Third.*

That said complainant do have and recover of and from the defendant, Union State Bank, a corporation, the sum of \$18,018.58 with interest thereon from the 25th day of August, 1911, at the rate of 6% per annum, together with all costs of suit incurred by said defendant or on its account, the net amount when paid to apply as a credit on said decree for money so rendered by this court in equity cause 1239 on the 5th day of September, 1911.

### *Fourth.*

That if said defendant, Union State Bank, shall fail to pay to the complainant said last mentioned amount and interest within ten days from the date of this decree, execution shall issue therefor; and if the defendants, Oklahoma Trust Company, Alamo State Bank, The McNerney Company, P. J. McNerney, the State Banking Board of the State of Oklahoma, and E. B. Cockrell, Bank Commissioner of the State of Oklahoma, or his successor in office, and each of them shall for said period of ten days, fail to pay the amounts hereinbefore adjudged against the above mentioned securities, then and thereupon said securities, or such of them as remain uncollected, shall be sold to pay off and satisfy the amounts adjudged against them respectively as aforesaid; and said complainant shall be entitled to any and all amounts collected thereon up to the amounts herein adjudged against the same in his favor. De Roos Bailey is hereby appointed special master to make sale of said securities, or such of them as remain uncollected, and he shall deliver to the parties herein adjudged entitled to the same the proceeds of such as have been collected. Any sale shall be made at public auction in the City of Muskogee, in the State of Oklahoma, and said special master will cause public notice to be given of the time

and place of sale for at least ten days before the day of sale; the notice shall be given by advertisement published in some newspaper printed in Muskogee, and by two advertisements put up in the township in which Muskogee is located. No further order or approval of the court shall be necessary to the validity of any sale made by said special master hereunder, provided the securities mentioned in the first paragraph hereof shall sell for not less than \$10,000.00, and provided the securities mentioned in the second paragraph hereof shall sell for not less than \$8,000.00. Said special master may retain out of the proceeds of sale the amount of his reasonable expenses and he may retain for his services 5% of the amount realized, filing with the clerk a report of his acts and a statement of his account, and he shall at once pay over the balance to the complainant and file with the clerk the receipt of the complainant or his solicitor. If the net proceeds of the sale of securities mentioned in the first paragraph hereof, together with the net proceeds of such of them as have been collected, shall exceed the amount adjudged against them in said paragraph with interest, the special master shall turn over the excess to the defendant Union State Bank, or to the proper officer of said State Banking Board if said Union State Bank shall decline to receive the same. If the complainant shall become the purchaser of any of said securities he shall pay the amount of costs and expenses chargeable against the same, and, to the extent of the amount adjudged against the same in his favor, shall credit the balance on his claim.

*Fifth.*

That said complainant was a depositor of the defendant, Oklahoma Trust Company, within the meaning of the laws of the State of Oklahoma governing the guaranteed payment of bank deposits, to the extent of \$25,357.63, on the 3d day of January, 1910, but because it is the opinion of the court that the State Banking Board represents the state, and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day.

*Sixth.*

That the decree *pro confesso* heretofore entered against the defendants, Oklahoma Trust Company, Alamo State Bank, The McNerney Company, and P. J. McNerney, is hereby made final, and, as to said defendants, the complainant is adjudged fully subrogated to the rights of depositors of said Oklahoma Trust Company, not only to the amount of the aforesaid sum of \$25,357.63, but also as to any deficiency that may remain

after he shall have collected the amount in this decree awarded against said Union State Bank and such amounts as may be realized on the securities mentioned in the first and second paragraphs hereof, which is to say, it is hereby adjudged that in addition to said \$25,357.63, funds amounting to \$61,252.40, on which the complainant had a lien, and to which he was entitled were, on the 3rd day of January, 1910, wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance, request and demand of the Bank Commissioner representing said State Banking Board, to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore the complainant is fully subrogated to all rights of such depositors; but, because it is the opinion of the court that said State Banking Board represents the state and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day.

*Seventh.*

By stipulation of the solicitors for the complainant and defendant, the State Banking Board, the bank commissioner, and Union State Bank, the sale of the aforesaid securities may be private and without advertisement or subsequent approval of the court.

To the action of the court in denying him further recovery in accordance with the prayer of his bill of complaint, and in refusing to grant the relief sought against said State Banking Board, said complainant, excepted; and the State Banking Board, the Bank Commissioner, and Union State Bank except to each and every paragraph and subdivision of this decree, and particularly to that part of the decree for money against Union State Bank, and to the refusal of the court to decree a superior lien in favor of the State Banking Board against the impounded securities, and to the adjudication that the complainant was a depositor of the Oklahoma Trust Company and to the adjudication of subrogation.

And said complainant and the defendants State Banking Board, the Bank Commissioner, and Union State Bank, each separately in open court prayed an appeal, and gave notice of an appeal, to the United States Circuit Court of Appeals for the Eighth Circuit, and their respective prayers were by the court granted and the appeals allowed, and the bond of each for appeal was fixed at the sum of \$1,000.00, which, in the case of the complainant, with the United States Fidelity and Guaranty Company as surety, was presented and approved in open court, this being merely a cost bond on appeal and not a supersedeas, and the complainant being at liberty,

if supersedeas is not furnished by the defendants, to enforce so much of this decree as is favorable to him, without prejudice to his appeal or his right, if any, to reverse that portion of this decree which denies him further recovery; and the complainant and each of said defendants also in open court prayed and was allowed a severance, so that they may prosecute their respective appeals without making the defendants other than said State Banking Board, the Bank Commissioner, and Union State Bank parties thereto.

RALPH E. CAMPBELL,

*District Judge.*

Endorsed: Filed Feb. 21, 1910, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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And, to-wit, on the 16th day of March, A. D. 1914, the complainant filed Petition for Allowance of Appeal to the Supreme Court of the United States, which Appeal was allowed by the Court. Said Petition for Allowance of Appeal and Order Allowing same are in words and figures as follows:

**Petition for and Order Allowing Appeal.**

Comes now W. S. Farish, complainant in the above entitled and numbered cause, and feeling himself aggrieved at the final decree rendered therein on the 21st day of February, 1914, and particularly at that portion of said decree which denies the complainant the recovery sought against the State Banking Board, of the State of Oklahoma on the ground that the suit was in effect one against the State of Oklahoma and that under a proper construction of the Eleventh Amendment to the Constitution of the United States the judicial power or jurisdiction of the court does not extend to such suits, petitions the court for an order allowing him to prosecute an appeal therefrom to the Supreme Court of the United States and that said question of jurisdiction may be certified to the said Supreme Court, and also for an order fixing the amount of security which the complainant shall be required to furnish.

Petitioner submits herewith his assignment of errors.

AMOS L. BEATY,

*Solicitor for Complainant.*

Upon consideration of the above and foregoing petition in open court it is ordered that the appeal be allowed as prayed



for and that the complainant give security in the sum of \$1,000.00, the same to operate as a cost bond only.

Given under my hand this, the 16th day of March, 1914.

RALPH E. CAMPBELL,  
*United States District Judge.*

Endorsed: Filed Mar. 16, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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And, to-wit, on the 16th day of March, A. D. 1914, the following Certificate was made and entered in this cause:

**Certificate.**

In this cause I hereby certify that the part of the final decree herein made and entered on the 21st day of February, 1914, denying the recovery for money sought by the complainant against the State Banking Board, of the State of Oklahoma, is based solely on the ground that this, in that respect, is a suit against the State of Oklahoma and that under the Eleventh Amendment to the Constitution of the United States there is no jurisdiction in this court to hear and determine the same.

This certificate is made conformably to the Act of Congress of March 3, 1911, chapter 231, and is hereby made a part of the record in said suit and will be sent up as a part of the proceedings therein, and this court pursuant to the said Act of Congress hereby certifies to the Supreme Court of the United States for decision said question of the jurisdiction.

Given under my hand this, the 16th day of March, 1914.

RALPH E. CAMPBELL,  
*United States District Judge.*

Endorsed: Filed Mar. 16, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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And on the 16th day of March, A. D. 1914, the complainant filed with his Petition for Appeal an Assignment of Errors, which is in words and figures as follows:

**Assignment of Errors.**

Now comes W. S. Farish, complainant in the above entitled and numbered cause, and shows that in the proceedings

therein and in the final decree rendered on the 21st day of February, 1914, grave error has happened, to the complainant's injury and prejudice, in that:

### I.

The court erred in holding that the State Banking Board, of the State of Oklahoma was not suable, and in refusing to render a decree in favor of the complainant against said board for the amount in which the complainant was adjudged to have been a depositor of the Oklahoma Trust Company, namely, the sum of \$25,357.63 with interest thereon from the 3d day of January, 1910, and in refusing to grant a suitable and proper order requiring said board to pay said amount and interest, and to levy an assessment, if necessary, and in holding that under the Eleventh Amendment to the Constitution of the United States the judicial power or jurisdiction of the court does not extend to suits wherein such relief is sought.

### II.

The court erred in holding that the State Banking Board of the State of Oklahoma was not suable, and in refusing to render a decree in favor of the complainant against said board for the further amount of such deficiency as may remain after the complainant has exhausted the impounded securities, which is to say, the sum of \$61,252.40, with interest thereon from the 3d day of January, 1910, less such net amount as the complainant may realize out of the securities on which a lien in his favor is foreclosed by the decree rendered, this being in addition to the item of \$25,357.63, and in holding that under the Eleventh Amendment to the Constitution of the United States the judicial power or jurisdiction of the court does not extend to suits wherein such relief is sought.

Wherefore the complainant prays that said decrees of the United States District Court for the Eastern District of Oklahoma be reversed, set aside and held for naught in said respects, and that the complainant be restored in all things which he has suffered or lost by reason thereof.

AMOS L. BEATY,

*Solicitor for Complainant.*

Endorsed: Filed Mar. 16, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District Oklahoma.

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**Appeal Bond.**

*Know all men by these presents*, that we, W. S. Farish, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the State Banking Board of the State of Oklahoma; the Bank Commissioner of said state and Union State Bank, a corporation, in the sum of One Thousand Dollars, to be paid to them or their legal representatives, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 14th day of March, 1914.

Whereas, the above named W. S. Farish has taken an appeal to the Supreme Court of the United States to reverse a certain portion of a decree rendered on this day in a cause wherein said W. S. Farish is complainant and the above named payees are defendants in the United States District Court for the Eastern District of Oklahoma:

Now therefore, the condition of this obligation is such that if said W. S. Farish shall prosecute said appeal with effect and answer all costs if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. S. FARISH,

By AMOS L. BEATY, *Solicitor*.

(Seal)

UNITED STATES FIDELITY & GUARANTY COMPANY, of Baltimore, Md.

By JNO. L. WISENER, *Attorney in Fact*.

Approved in open court:

RALPH E. CAMPBELL, *District Judge*.

Endorsed: Filed Mar. 16, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District Oklahoma.

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**Citation.**

*United States of America—ss.*

To State Banking Board of the State of Oklahoma; the Bank Commissioner of said state and Union State Bank, a corporation, *Greeting*:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the thirtieth day from the date hereof, pur-

suant to an appeal, filed in the clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein W. S. Farish is appellant and State Banking Board of the State of Oklahoma; the Bank Commissioner of said state and Union State Bank, a corporation, are respondents, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the United States, this 16th day of March, in the year of our Lord one thousand nine hundred and fourteen.

RALPH E. CAMPBELL,  
*District Judge.*

Service of above citation accepted this March 23rd, 1914.

W. A. LEDBETTER,  
*Atty. for above Defendants in Error or Appellees.*

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UNITED STATES MARSHAL'S RETURN.

*United States of America, West. Dist. of Oklahoma—ss.*

*Received* this writ March 23rd, 1914, at Oklahoma City, Okla., and executed same March 23rd, 1914, at Oklahoma City by leaving a true copy with W. A. Ledbetter, attorney of record for the within State Banking Board of the State of Oklahoma *et al.*

Fees \$2.00  
Exp. .00

JOHN Q. NEWELL, *U. S. Marshal,*  
By J. A. MULKEY, *Deputy.*

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And, to-wit, on the 4th day of April, A. D. 1914, the defendants, Banking Board of the State of Oklahoma, Bank Commissioner of the State of Oklahoma, and the Union State Bank, gave notice of their desire to prosecute a cross appeal to the Supreme Court of the United States, and thereupon the Union State Bank filed Motion for Supersedeas, which is in words and figures as follows:

**Motion for Supersedeas.**

*In the District Court of the United States for the Eastern District of Oklahoma, at Muskogee.—W. S. Farish, Plaintiff, v. State Banking Board et al., Defendants.—No. 1475.*

Now comes the defendant, the Union State Bank, appellant in its cross appeal herein, and respectfully suggests to

the court that it is now prosecuting its cross appeal from the judgment rendered against it on the 21st day of February, 1914, in the above styled cause, and desires to supersede the judgment rendered against it herein, and respectfully prays the court to fix the amount of the supersedeas bond herein.

LEDBETTER, STUART & BELL,

*Solicitors for Union State Bank, Appellant.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

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And, to-wit, on the 4th day of April, A. D. 1914, the following order fixing amount of supersedeas bond for Union State Bank was made and entered in this cause:

**Order Fixing Amount of Supersedeas Bond.**

On this the 4th day of April, 1914, came on to be heard, before the undersigned judge, the application of the Union State Bank, defendant in this cause and appellant in its appeal, for an order fixing the amount of the supersedeas bond; and after due consideration said motion is hereby granted, and the amount of said supersedeas bond is hereby fixed at the sum of Twenty Thousand Dollars (\$20,000.00).

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

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And, on the same day, to-wit, the 4th day of April, A. D. 1914, the defendant Union State Bank filed its Supersedeas Bond, which is in words and figures as follows:

**Supersedeas Bond.**

*Know All Men by These Presents:* That we, the Union State Bank, as principal, and Southern Surety Company, and Southwestern Surety Insurance Company, as sureties, acknowledge ourselves to be jointly indebted unto W. S. Farish in the sum of Twenty Thousand Dollars (\$20,000.00) conditioned that, whereas, on the 21st day of February, 1914, in the above styled cause, pending in the District Court of the United States for the Eastern District of Oklahoma, wherein W. S. Farish was plaintiff and the said Union State Bank, et al., were defendants, said cause being numbered on the docket of said court Equity Number 1475, a decree was rendered against the said Union State Bank; and the said Union State Bank having obtained an appeal to the Supreme Court of the United States to reverse said decree, said appeal hav-

ing been granted on April 4, 1914, and the said W. S. Farish being required to appear at a session of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, within thirty (30) days from the date of the taking of said appeal;

*Now, therefore*, if the said Union State Bank shall prosecute its said appeal with effect and answer the damages and costs; if it shall make its plea good, then the above obligation shall be null and void; otherwise, to remain in full force and effect.

*Witness our hands* on this the 4th day of April, 1914.

UNION STATE BANK, *Principal*,  
By LEDBETTER, STUART & BELL,  
*Its Solicitors.*

(Seal) SOUTHERN SURETY Co., *Surety*,  
By O. A. WELLS, *Vice President.*

(Seal) SOUTHWESTERN SURETY INSURANCE  
COMPANY, *Surety*,  
By M. L. BRAGDON, *Attorney in Fact.*

The above bond is hereby approved on this the 4th day of April, 1914.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

And, on the same day, to-wit, the 4th day of April, A. D. 1914, the defendants, State Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma and the Union State Bank, filed a petition for an appeal to the Supreme Court of the United States, in words and figures as follows:

#### **Petition for Appeal.**

*To the Honorable Ralph E. Campbell, Judge of the United States District Court for the Eastern District of Oklahoma:*

Now come the defendants in the above cause, to-wit, the State Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, a corporation, and conceiving themselves aggrieved by the final decree, order, and judgment entered in the above entitled cause on the 21st day of February, 1914, hereby appeal, separately, from so much of said final decree or order



as adjudges and decrees that judgment be rendered against the Union State Bank for the amount of a certain deposit in the sum of Eighteen Thousand and Eighteen and 58/100 Dollars (\$18,018.58), with interest, being a certain deposit alleged to have been transferred from the Alamo State Bank to the Union State Bank, on or about the 25th day of August, 1910, and holding that the State of Oklahoma, acting by and through the State Banking Board and the State Bank Commissioner of the State of Oklahoma, did not have a first and prior lien as against the claim of the plaintiff for the reimbursement of the amount of money taken by the said State Banking Board and Bank Commissioner from the depositors' guaranty fund, to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company; and also appeal, separately, from that portion of said judgment or final decree rendering judgment in favor of the plaintiff, W. S. Farish, foreclosing a lien upon certain notes and other securities in the hands of De Roos Bailey, under agreement dated September 23, 1910, said agreement being executed by the plaintiff, the Union State Bank, the Alamo State Bank, and the Oklahoma Trust Company, and holding that the State of Oklahoma, acting by and through the Banking Board of the State of Oklahoma, and the Bank Commissioner of the State of Oklahoma, did not have a prior and first lien as against the claim of the plaintiff for the reimbursement of the amount of money taken by the Banking Board and Bank Commissioner from the depositors' guaranty fund, to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company.

And the said defendants, to-wit, the Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, further represent that heretofore on the 16th day of March, 1914, the plaintiff W. S. Farish prayed for and obtained an appeal in this cause from said judgment and final decree to the Supreme Court of the United States, and these defendants desire to prosecute a cross appeal from said judgment and final decree to said Supreme Court of the United States.

And the said defendants, to-wit, the Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, pray that this, its appeal to the Supreme Court of the United States, may be allowed, and that a transcript of the record and proceedings and the papers upon which said final decree and order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States; and now, at the time of the filing of this petition for appeal, the said defendants, the State Banking Board of the State of Oklahoma, the Bank

Commissioner of the State of Oklahoma, and the Union State Bank, file assignments of error, setting up separately and particularly each error asserted and intended to be alleged, in the Supreme Court of the United States.

State Banking Board of the State  
of Oklahoma;

Bank Commissioner of the State of  
Oklahoma;

Union State Bank,

By LEDBETTER, STUART & BELL,  
*Their Solicitors.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

And, on the same day, to-wit, on the 4th day of April, A. D. 1914, the defendants, State Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, filed Assignments of Error, in words and figures as follows:

#### **Assignments of Error.**

Now comes the State Banking Board, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, and respectfully allege that the following errors occurred in the proceedings and the decree in the above styled cause in the United States Court for the Eastern District of Oklahoma:

1. The court erred in rendering judgment against the Union State Bank for the amount of a certain deposit in the sum of Eighteen Thousand and Eighteen and 58/100 Dollars (\$18,018.58), with interest, being a certain deposit alleged to have been transferred from the Alamo State Bank to the Union State Bank, on or about the 25th day of August, 1910, and in not holding that the State of Oklahoma, acting by and through the State Banking Board and the Bank Commissioner, had a first and prior lien as against the claim of the plaintiff, for the reimbursement of the amount of money taken by the Banking Board and Bank Commissioner from the depositors' guaranty fund, to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company.

2. The court erred in rendering judgment in favor of the plaintiff, foreclosing a lien upon certain notes and other securities in the hands of De Roos Bailey, under agreement, dated September 23, 1910, and executed by the plaintiff, the

Union State Bank, the Alamo State Bank, and the Oklahoma Trust Company, and in not holding that the State of Oklahoma, acting by and through the Banking Board of the State of Oklahoma and the Bank Commissioner of the State of Oklahoma, had a prior and first lien as against the claim of the plaintiff for the reimbursement of the amount of money taken by the Banking Board and Bank Commissioner from the depositors' guaranty fund to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company.

Wherefore, the said State Banking Board and Bank Commissioner and Union State Bank, appellants on the cross appeal herein, pray that the judgment of the court below against them be reversed.

LEDBETTER, STUART & BELL,

*Attorneys for State Banking Board,  
Bank Commissioner and Union State  
Bank.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

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And, on the same day, to-wit, on the 4th day of April, A. D. 1914, the following order allowing the appeal of the State Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, was made and entered in this cause:

#### **Allowance of Appeal.**

On this, Saturday, the 4th day of April, 1914, there was presented to the undersigned Judge of the United States District Court for the Eastern District of Oklahoma, at Muskogee, Oklahoma, the petition of the defendants, the Banking Board of the State of Oklahoma, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, for an appeal from the judgment or final decree herein to the Supreme Court of the United States;

And it is hereby ordered, adjudged, and decreed that said petition for such appeal be and the same is hereby allowed.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

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And, on the same day, to-wit, on the 4th day of April, A. D. 1914, the State Banking Board of the State of Oklahoma, and the Bank Commissioner of the State of Oklahoma, filed their Cost Bond, in words and figures as follows:

**Cost Bond.**

*Know All Men by These Presents:* That the Banking Board of the State of Oklahoma and the Bank Commissioner of the State of Oklahoma, as principals, and the Southern Surety Company, as surety, acknowledge ourselves to be jointly indebted unto W. S. Farish in the sum of Five Hundred (\$500.00) Dollars conditioned that, whereas, on the 21st day of February, 1914, in the above styled cause pending in the District Court of the United States for the Eastern District of Oklahoma wherein W. S. Farish was plaintiff and the Banking Board of the State of Oklahoma and the Bank Commissioner of the State of Oklahoma, and others, were defendants, a decree was rendered against the said Banking Board and Bank Commissioner; and the said Banking Board and Bank Commissioner having obtained an appeal to the Supreme Court of the United States to reverse said decree, said appeal having been granted on April 4, 1914; and the said W. S. Farish being required to appear at a session of the Supreme Court of the United States to be held in the City of Washington, District of Columbia, within thirty (30) days from the date of the taking of said appeal;

*Now, therefore,* if the said State Banking Board and the said Bank Commissioner of the State of Oklahoma shall prosecute said appeal with effect and answer all costs; if they shall fail to sustain their appeal then the above obligation shall be null and void, otherwise to continue in full force and effect.

Banking Board of the State of  
Oklahoma;

Bank Commissioner of the State  
of Oklahoma, Principals,

By LEDBETTER, STUART & BELL,  
*Their Solicitors.*

(Seal)

SOUTHERN SURETY Co., *Surety,*  
By O. A. WELLS, *Vice President.*

The above bond is hereby approved on this the 4th day  
of April, 1914. RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
United States District Court, Eastern District of Oklahoma.

**Waiver of Notice on Appeal.**

Now comes the plaintiff, W. S. Farish, and waives the issuance of citation herein on appeal herein of the defendants, Banking Board of the State of Oklahoma, Bank Commissioner of the State of Oklahoma, and the Union State Bank, to the

Supreme Court of the United States; and hereby acknowledges full notice of such appeal, and consents that no citation issue herein on such appeal.

*Amos L. Betty*  
 .....  
 Solicitor for Plaintiff.

(Western Union Telegram—regular form.)

Received at 104 N. Second St., Muskogee, Okla. Phones 1558,  
 1559.

38KS FO 69 BP New York, New York, April 3, 1914.

R. P. Harrison, Clerk,  
 Muskogee, Oklahoma.

Farish versus Board. Have telegram from Stuart. I again agree that cross appeal papers may be printed in record, provided papers are all filed [filed] and appellees will not delay you further; and provided also, that ample time will remain for filing records. And I also waive notice of cross appeals. Records and copies, together with original writs and citations, should be sent me here for filing [filing] in both appeals.

AMOS L. BETTY. [BEATY] 1117AM

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
 United States District Court, Eastern District of Oklahoma.

**Praecept of State Banking Board, Bank Commissioner and  
 Union State Bank, Suggesting Additional Portions  
 of Record Within Ten Days After Service  
 of Praecept Under Equity Rule  
 Number Seventy-five.**

The Clerk will include in the record of this case on appeal and cause to be printed, in addition to the documents and papers required by the complainant, the following:

1. Motion for Supersedeas.
2. Order Fixing Supersedeas.
3. Supersedeas Bond.
4. Assignments of Error.
5. Motion for Appeal.

LEDRETT, STUART & BELL,  
*Solicitors for State Banking  
 Board, Bank Commissioner,  
 and Union State Bank.*

Endorsed: Filed Apr. 4, 1914, R. P. Harrison, Clerk  
 United States District Court, Eastern District of Oklahoma.

**Certificate of Clerk.**

*United States of America, Eastern District of Oklahoma—ss.*

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of *W. S. Farish v. State Banking Board et al.*, No. 1475, as was ordered by praecipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I do further certify that the original Citation in the appeal of *W. S. Farish*, with service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in the City of Muskogee, this *6th* day of *April*, 1914.

R. P. HARRISON, Clerk.

*L. S.*

By

*H. E. Boudinot*

Deputy.



MAY 25 1914

JAMES D. MAHER

CLERK

OCTOBER TERM, 1913.

IN THE

# Supreme Court of the United States

No. ~~107~~ 446

W. S. FARISH,

vs.

*Appellant,*

STATE BANKING BOARD OF THE STATE OF  
OKLAHOMA; THE BANK COMMISSIONER OF  
THE STATE OF OKLAHOMA, AND THE UNION  
STATE BANK, a Corporation,

*Appellees.*

No. ~~100~~ 447

STATE BANKING BOARD OF THE STATE OF  
OKLAHOMA; THE BANK COMMISSIONER OF  
THE STATE OF OKLAHOMA, AND THE UNION  
STATE BANK, a Corporation,

vs.

*Appellants,*

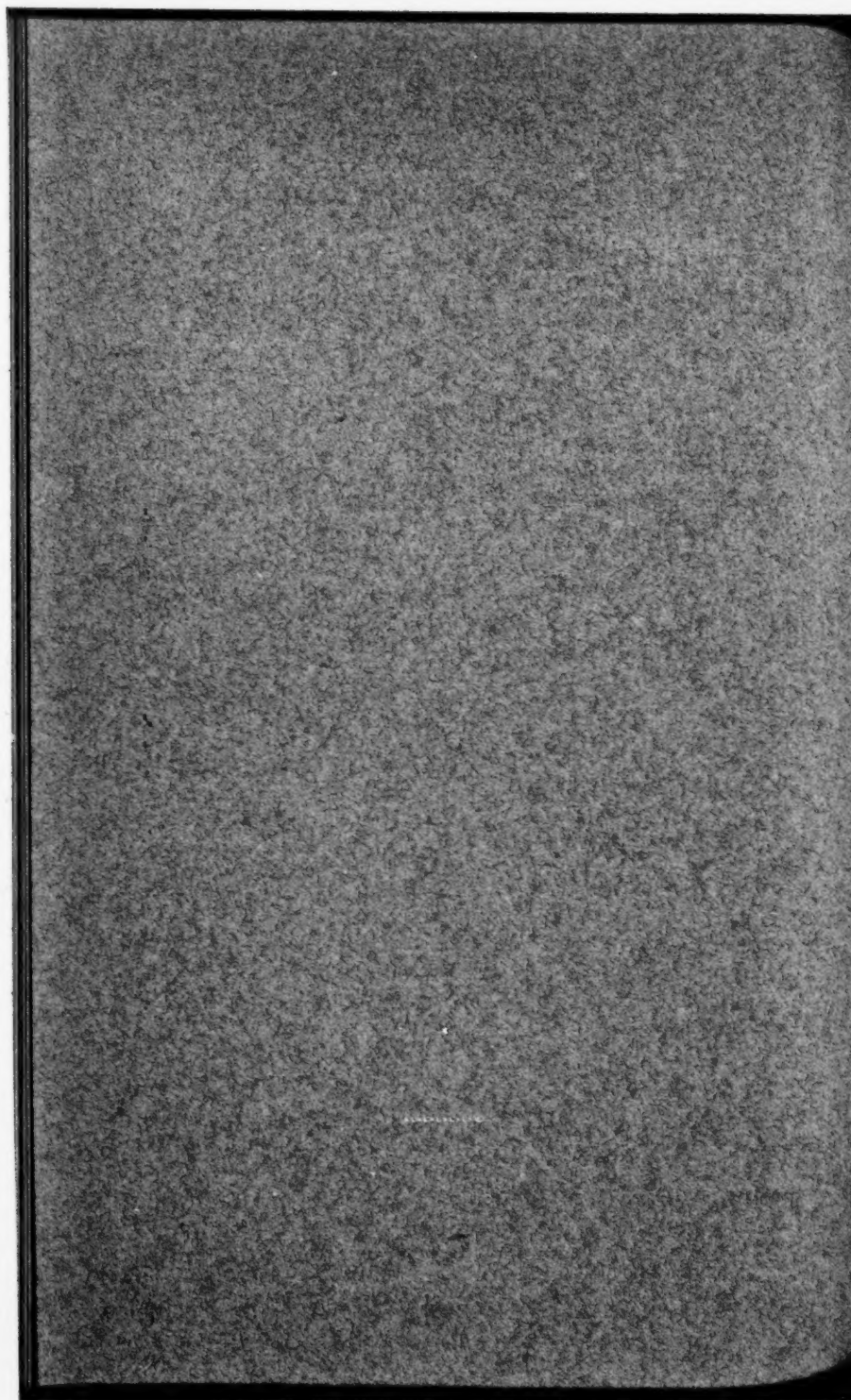
W. S. FARISH,

*Appellee.*

Appeals from the District Court of the  
United States for the Eastern District  
of Oklahoma.

## MOTION TO ADVANCE

AMOS L. BEATTY,  
*Solicitor for W. S. Farish.*



OCTOBER TERM, 1913.

IN THE  
**Supreme Court of the United States**

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No. 1017.

W. S. FARISH,

*vs.*

*Appellant,*

STATE BANKING BOARD OF THE STATE OF  
OKLAHOMA; THE BANK COMMISSIONER OF  
THE STATE OF OKLAHOMA, AND THE UNION  
STATE BANK, a Corporation,

*Appellees.*

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No. 1018.

STATE BANKING BOARD OF THE STATE OF  
OKLAHOMA; THE BANK COMMISSIONER OF  
THE STATE OF OKLAHOMA, AND THE UNION  
STATE BANK, a Corporation,

*vs.*

*Appellants,*

W. S. FARISH,

*Appellee.*

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**Appeals from the District Court of the  
United States for the Eastern District  
of Oklahoma.**

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**MOTION TO ADVANCE**

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Now comes W. S. Farish, appellant in the first-  
mentioned and appellee in the last-mentioned ap-

peal, and shows that these appeals are from a decree of the District Court of the United States for the Eastern District of Oklahoma in a suit brought by your mover against the State Banking Board of the State of Oklahoma and others to subject certain property to a lien and to recover against said Banking Board the amount of a certain deficiency; that on the final hearing the District Court entered a decree subjecting the property mentioned in accordance with the prayer, but refused to enter a decree against said Banking Board for the deficiency which was found, the refusal being distinctly placed on the ground that said Banking Board represented the State of Oklahoma, and that under the Eleventh Amendment to the Constitution of the United States the jurisdiction or judicial power of the Court did not extend to suits of this kind; that the question involved on the appeal taken by your mover is that of the jurisdiction of the Court below, the Court having held that it was without jurisdiction to enter a decree against said Banking Board, whereas your mover contends that this is not a suit against the State of Oklahoma and that the Court had jurisdiction to enter such decree; that said Banking Board and another defendant, the Union State Bank, have prosecuted a cross appeal from that portion of the decree subjecting the property mentioned, and that the record on said appeals has been brought up in a single transcript.

Your mover further shows that the question here involved is involved also in other appeals now pending in this Court, namely, October Term, 1913, Number 929, J. D. Lankford, Bank Commissioner of the State of Oklahoma, *et al.*, appellants, *vs.* Platte Iron Works Company, appellee,

and Number 978, American Water Softener Company, appellant, *vs.* J. D. Lankford, Bank Commissioner of the State of Oklahoma, appellee, which appeals have been advanced, or are now pending on motion to advance.

And your mover further shows that the solicitors for the opposite side in the present appeals have waived notice of this motion and consented for these appeals to be advanced.

Wherefore your mover prays the Court to advance these appeals upon the docket of the Court for submission and argument.

AMOS L. BEATY,  
*Solicitor for W. S. Farish.*





MAILED - SUPREME COURT, U. S.

FILED

AUG 25 1914

JAMES D. MAHER

CLERK

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1914.

**No. 446**

**W. S. FARISH,**

**APPELLANT,**

**vs.**

**STATE BANKING BOARD AND BANK COMMISSIONER OF THE STATE OF OKLAHOMA  
AND THE UNION STATE BANK,**

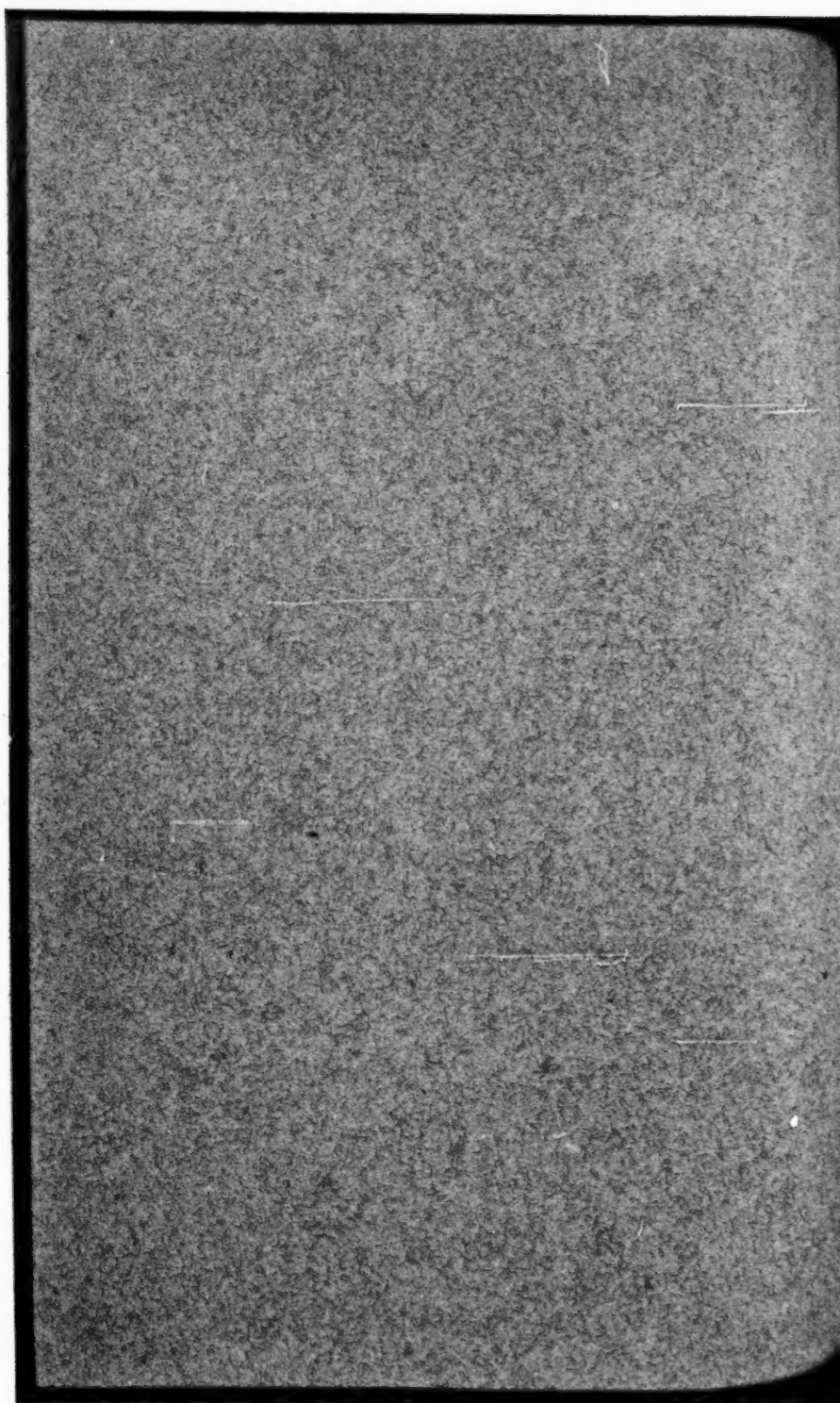
**APPELLEE.**

**APPEAL FROM DISTRICT COURT FOR EASTERN DISTRICT OF  
OKLAHOMA.**

**BRIEF FOR APPELLANT.**

**AMOS L. BEATT,**

*Counsel for Appellant.*



# Supreme Court of the United States,

OCTOBER TERM, 1914.

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No. 446.

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W. S. FARISH,  
APPELLANT,

*vs.*

STATE BANKING BOARD AND BANK COM-  
MISSIONER OF THE STATE OF OKLA-  
HOMA AND THE UNION  
STATE BANK,  
APPELLEES.

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## **BRIEF FOR APPELLANT.**

### **Statement of the Case.**

This was a suit in equity brought by the appellant in the United States Circuit Court for the Eastern District of Oklahoma. The original defendants were the State Banking Board and the Bank Commissioner of the State of Oklahoma, the Oklahoma Trust Company, the Alamo State Bank and The McNerney Company, corporations, and one P. J. McNerney. Later by amendment the Union State Bank, another corporation, was brought in as a defendant. The complainant was a citizen of the State of Texas, while the defendants were citizens of the State of Oklahoma, and

this suit was ancillary and supplementary to another suit in the same court between parties whose citizenship was similarly diverse.

One object of the present suit was the compulsion of the Banking Board to pay the complainant, as an equitable depositor of the Oklahoma Trust Company, a failed banking institution, the sum of \$25,351.63. Another object was subrogation, and the establishment and enforcement of liens in the amount of \$61,252.40 upon certain funds and impounded securities, with a decree against the Banking Board for any final deficiency or unpaid balance.

The Banking Board demurred on the grounds (1) that the suit appeared to be one against the State and (2) that no cause of action was stated, but the demurrer was overruled.

Decrees *pro confesso* were obtained and eventually made final against all of the defendants except the Banking Board, the Bank Commissioner and the Union State Bank.

These latter answered admitting some of the allegations made by the complainant and denying others, and the complainant filed his general replication.

On final hearing the District Court as successor to the Circuit Court decreed subrogation and established and foreclosed a lien on one list of the securities in controversy of the face value of \$35,522.17 to secure the payment of \$16,530.98, and on another list of the face value of \$12,365.67 to secure \$20,000, and rendered a moneyed decree for \$18,018.58 against the Union State Bank which had appropriated that amount of the funds in suit; interest being allowed on all amounts. But the Court denied the claim against the

Banking Board, reversing the ruling that had been made on demurrer. It was held that the Banking Board represented the State and that under the Eleventh Amendment to the Constitution of the United States the Court had no jurisdiction.

There was an order of severance, and, as between the complainant and the answering defendants, the case is here on the appeal of the complainant and a certificate of jurisdiction made by the District Court.

A statement of the material facts pleaded and proven, and a more detailed statement of the issues raised and determined, may not be inappropriate at this stage. It will be made here, and the Court is asked to consider it as though repeated in the course of argument.

The complainant as transferee of The Texas Company, a creditor of The McNerney Company, under agreements made and performed in the early part of 1909, held a first lien on certain paving bonds issued by the City of Muskogee, Oklahoma, and on the proceeds of these bonds when sold, for an amount in excess of \$100,000. (R., 15-19, 37, 69, 73-100.) The Oklahoma Trust Company, doing a banking business under the Oklahoma statute governing the guaranty of bank deposits, had expressly recognized the validity and priority of this lien and had agreed to purchase the bonds at ninety cents on the dollar of their face value. (R., 16, 18, 25-26, 37.) The bonds were to be accepted and simultaneously paid for within five days after being tendered. (R., 16, 18.) And, as was adjudged in the other suit, it was to be a cash transaction, so that no

title would pass in advance of payment. (R., 36, 69.)

In November, 1909, the Oklahoma Trust Company obtained certain of these bonds and disposed of them. The net amount of the proceeds at ninety cents on the dollar was \$25,351.63. This amount it deposited in its banking department to its own credit as trustee. It did this instead of paying the money over because The McNerney Company had objected to such payment. The amount was thereafter carried as a deposit on its bank books and was listed as a deposit in a schedule of assets and liabilities when subsequently the assets passed into the hands of the Bank Commissioner. (R., 30, 37, 69, 109.)

On December 13, 1909, other paying bonds, likewise subject to the complainant's lien, were obtained at a night session of the city council. They were sent north by a special messenger on the same night. At St. Louis, Missouri, they were turned over to an attorney who afterwards sold the greater portion of them to Spitzer & Company of Toledo, Ohio. The net proceeds amounted to \$63,117.85. (R., 37, 81-114.)

At this juncture, on December 18, 1909, and before there had been any misapplication of the proceeds of these bonds, the complainant filed his bill of complaint in the prior suit mentioned in the preliminary statement, and sought, among other things, to have such proceeds declared subject to a first and prior lien in his favor. He obtained a restraining order which was immediately served on the president of the Oklahoma Trust Company and on P. J. McNerney personally. By the terms of this restraining order the Oklahoma Trust Company was enjoined and restrained from



commingling or confusing the proceeds of these bonds with any other funds, and was peremptorily commanded and required to keep them separate and apart from other funds. (R., 53-55.)

On the night of the day in which this writ was issued and served, December 18, 1909, the attorney who disposed of the bonds telegraphed the Oklahoma Trust Company as follows:

(R., 116):

“Spitzer takes 33. You get draft. Send me copy of bill for injunction immediately. It looks easy to meet.”

Then in the face of the restraining order, and while it was in full force and effect, the proceeds of these bonds were appropriated by the Oklahoma Trust Company. On December 31, 1909, a portion amounting to \$21,252.40 was placed to its credit with the Hamilton National Bank, of Chicago, Illinois. (R., 103-104.) Three days later, on January 3, 1910, the Oklahoma Trust Company, having become insolvent and being in the hands of the Bank Commissioner, transferred its assets, including its balance with the Hamilton National Bank, to the Alamo State Bank. (R., 107-110.) On January 22, 1910, another portion amounting to \$40,000 was sent to Kansas City, Missouri; and at that time and place \$20,000 of this was applied on an indebtedness of \$40,000 to the Commerce Trust Company and the remaining \$20,000 was turned over to the Alamo State Bank pursuant to the previous transfer of assets. (R., 104-105, 145-149.) A portion of the last mentioned \$20,000 was passed directly to the credit of the Alamo State Bank and the balance was credited to P. J. McNerney, who transferred it by his

check to the Alamo State Bank. (R., 104.) And on April 18, 1910, the Alamo State Bank paid an indebtedness of \$50,000 to the Hamilton National Bank and in so doing used \$16,530.98 of the proceeds of the paving bonds that had been transferred to it by the Oklahoma Trust Company. (R., 150, 100-122.)

The indebtedness of \$40,000 to the Commerce Trust Company and \$50,000 to the Hamilton National Bank had been incurred by the Oklahoma Trust Company in the latter part of 1909, and the last mentioned indebtedness of \$50,000 had been assumed and renewed by the Alamo State Bank. (R., 150, 161.) To secure the payment of these amounts the Oklahoma Trust Company had pledged certain notes and bonds as collateral, and when the final payments were made the collaterals were released to the Alamo State Bank. Among the collaterals so released by the Commerce Trust Company were notes and bonds amounting at face to \$12,365.67, and those so released by the Hamilton National Bank amounted at face to \$35,522.17. They are fully described in paragraphs IX and X of the bill of complaint and also in the final decree. (R., 145-150, 157.)

Various proceedings were had in the former suit looking to the location and sequestration of these funds and securities and to a full ascertainment of the facts. Motions against different persons were filed and heard. A receiver was appointed and among his duties was the collection of these funds. The Oklahoma Trust Company and all others having proceeds of the paving bonds were ordered to turn them over to the receiver. Finally on August 6, 1910, the complainant filed a motion against the Alamo State

Bank for contempt of court, and asked for an order requiring it to immediately pay over the proceeds of bonds to the amount of \$61,252.40, that being as much of the \$63,117.85 as had reached its hands. There was also a prayer that in default of such payment the property of the bank be seized as under distringas or sequestration. Notice was given that this motion would be presented to the court on September 1, 1910, or as soon thereafter as counsel could be heard. (R., 61-67, 150.)

Thereupon the Alamo State Bank went into the hands of the Bank Commissioner, and on August 25, 1910, its assets were sold under an order of the District Court of Muskogee County to the Union State Bank, a new corporation organized for the purpose of making this purchase. The Union State Bank assumed the payment of all depositors and received into its custody all of the assets of the Alamo State Bank accompanied by certain guaranties of the Banking Board. It received from the Alamo State Bank the amount of cash which the latter then had on hand amounting to \$18,018.58. (R., 71-72, 75-78, 152-165.)

There was no proof that the cash which the Alamo State Bank had on hand was ever at any time less than this amount after it received the \$20,000 from the proceeds of the bonds. (R., 44-165.)

On September 23, 1910, an agreement was reached between the complainant and the Union State Bank, to which the Oklahoma Trust Company and the Alamo State Bank were also parties, whereby the securities that had been released by the Commerce Trust Company and the Hamilton National Bank as a result of the use of the pro-

ceeds of the bonds were place in the hands of De Roos Bailey as custodian and trustee, subject to the adjudication of the complainant's claim, and the Union State Bank gave bond with surety to answer any decree of court for the \$18,018.58 received by it from the Alamo State Bank, and the complainant waived any right he had to the appointment of a receiver. (R., 69-71.)

In the transaction of January 3, 1910, the Alamo State Bank assumed the payment of depositors of the Oklahoma Trust Company to the amount of \$448,585.37. (R., 109-110.) All of this had been paid in full when the testimony was taken, except \$6,000 or \$7,000 that had not been called for. (R., 75, 78.) The cash and other assets received, and out of which the payment of the depositors was made, were scheduled in the contract. (R., 109-110.) Included in the assets received were McNerney notes amounting to about \$85,000, and it was in virtue of this that the parties assumed to apply the proceeds of paying bonds as they did; they credited the amount on these notes and also on notes to secure which these were pledged as collateral. (100-104, 146.)

This transfer of January 3, 1910, "was at the instance, request and demand of the Bank Commissioner of the State of Oklahoma" and "was the means and plan adopted by said Trust Company under the direction of said Bank Commissioner to liquidate its affairs and pay its depositors." (R., 25, 114.)

The McNerney Company, the Oklahoma Trust Company and the Alamo State Bank are each and all insolvent. (R., 110.)

Complainant presented his claim to the State Banking Board prior to suit, but it was not ap-

proved and is now being resisted in its entirety. (R., 151.)

When it failed the Alamo State Bank owed its depositors \$324,000; and the defendants showed that the Banking Board had advanced the Union State Bank \$140,300, and will be required to advance \$46,000 more to protect depositors of the Alamo State Bank; but the extent of assets or security held was not shown. (R., 75, 165.)

It is not thought necessary to re-state at any length the contents of the bill of complaint or the amendment thereto or the supplemental bill in the present suit. The essential facts that have just been narrated were pleaded in the usual way, with perhaps more particularity than has been observed here, and it is thought that the prayer will be found ample to include the relief that was granted in the final decree, and also the additional relief which is being sought by this appeal.

References have been made to the former suit. It was an action by the present complainant against The McNerney Company, the Oklahoma Trust Company, and others, filed December 18, 1909, to subject the paving bonds and their proceeds to the payment of the indebtedness of The McNerney Company to the complainant, and to have this lien adjudged prior and superior to other claims, and for other incidental relief. In that case the Oklahoma Trust Company claimed a lien on the bonds and their proceeds, and pleaded a lack of authority in its officers who signed the agreements acknowledging priority in the complainant's lien. Much evidence was heard on that issue, and on the issue of whether or not the Oklahoma Trust Company had ratified the act of

its officers, and the court decided against the plea and sustained the agreement acknowledging priority. The final decree was, among other things, that the complainant became entitled to the very proceeds of the paving bonds, and the Oklahoma Trust Company was ordered forthwith to deliver those proceeds to the complainant. That decree was passed on October 9, 1910, after the present suit was filed, but it was set up and invoked as *res adjudicata* in a supplemental bill. (R., 33-39.)

In the present suit the answering defendants again denied the authority of the officers of the Oklahoma Trust Company who signed the agreements giving priority to the complainant's lien, and all of the evidence introduced in the former suit on that issue of authority, or showing or tending to show that the Oklahoma Trust Company had ratified the act of its officers, was brought forward and again introduced. (R., 69, 80.) It was shown also that the attorney who represented the Oklahoma Trust Company in that suit, and under whose direction was litigated this issue of authority or ratification, did so under employment by the Banking Board. (R., 149-150.) As has been indicated, the court in this suit reached the same conclusion and made the same finding and adjudication as in the former suit; and the understanding of counsel is that appellees have abandoned their contention; hence the evidence in that connection has not been stated.

The Union State Bank in its answer claimed to have acquired the \$18,018.58 in cash and also the securities above mentioned from the Bank Commissioner without notice of any adverse claims of title and to be entitled to protection as a *bona fide* purchaser. But since this issue was resolved



against the bank, and the present appeal involves no question of that kind, the evidence on the issue, for and against the contention, has also been omitted.

The liens foreclosed in the final decree were, on the securities released by the Commerce Trust Company on January 22, 1910, for the payment of \$20,000, with legal interest from that date, and on the securities released by the Hamilton National Bank on April 18, 1910, for the payment of \$16,530.98, with legal interest from that date, the amount collected in each instance to apply as credits on the decree in the former suit; and the award against the Union State Bank for \$18,018.58, with legal interest from August 25, 1911, was on account of the money received by the Union State Bank from the Alamo State Bank on that date, it being a part of the \$20,000 derived from paying bonds and received by the Alamo State Bank on January 22, 1910, the amount collected from the Union State Bank to likewise apply as a credit on the decree in the former suit. And the disposition made by the court of the remainder of the appellant's case is best shown by quoting two paragraphs of the decree at length. (R. 186-187):

“FIFTH.

“That said complainant was a depositor of the defendant, Oklahoma Trust Company, within the meaning of the laws of the State of Oklahoma governing the guaranteed payment of bank deposits, to the extent of \$25,351.63, on the 3d day of January, 1910, but because it is the opinion of the court that the State Banking Board represents the state, and is not suable on such account, said

complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day.

“SIXTH.

“That the decree *pro confesso* heretofore entered against the defendants, Oklahoma Trust Company, Alamo State Bank, The McNerney Company, and P. J. McNerney, is hereby made final, and, as to said defendants, the complainant is adjudged fully subrogated to the rights of depositors of said Oklahoma Trust Company, not only to the amount of the aforesaid sum of \$25,351.63, but also as to any deficiency that may remain after he shall have collected the amount in this decree awarded against said Union State Bank and such amounts as may be realized on the securities mentioned in the first and second paragraphs hereof, which is to say, it is hereby adjudged that in addition to said \$25,351.63, funds amounting to \$61,252.40, on which the complainant had a lien and to which he was entitled, were, on the 3rd day of January, 1910, wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance, request and demand of the Bank Commissioner representing said State Banking Board, to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore the complainant is fully subrogated to all rights of such depositors; but, because it is the opinion of the court that said State Banking Board represents the state and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day.”

### **Assignments of Error.**

First.—The Court erred in holding that the State Banking Board of the State of Oklahoma was not suable, and in refusing to render a decree in favor of the complainant against said board for the amount in which the complainant was adjudged to have been a depositor of the Oklahoma Trust Company, namely, the sum of \$25,351.63 with interest thereon from the 3d day of January, 1910, and in refusing to grant a suitable and proper order requiring said board to pay said amount and interest, and to levy an assessment, if necessary, and in holding that under the Eleventh Amendment to the Constitution of the United States the judicial power or jurisdiction of the Court does not extend to suits wherein such relief is sought.

Second.—The Court erred in holding that the State Banking Board of the State of Oklahoma was not suable, and in refusing to render a decree in favor of the complainant against said board for the further amount of such deficiency as may remain after the complainant has exhausted the impounded securities, which is to say, the sum of \$61,252.40, with interest thereon from the 3d day of January, 1910, less such net amount as the complainant may realize out of the securities on which a lien in his favor is foreclosed by the decree rendered, this being in addition to the item of \$25,351.63, and in holding that under the Eleventh Amendment to the Constitution of the United States the judicial power or jurisdiction of the Court does not extend to suits wherein such relief is sought. (R., 190.)

As to the jurisdiction of this Court appellant cites *Scully vs. Bird*, 209 U. S., 481.

**Propositions.**

Under the foregoing assignments of error the following propositions will be argued:

**I.**

The Banking Board does not represent the State of Oklahoma in true governmental capacity and therefore is not within the exemption from suit contained in the Eleventh Amendment.

**II.**

But even if the Banking Board did represent the State it could not successfully claim here an exemption from suit since it owes the appellant a specific statutory duty.

**III.**

Moreover, by participation in the former suit and interference with the process of the Court the Banking Board waived any exemption from suit which otherwise it might have claimed.

**IV.**

The fact that the statute fails to classify the Banking Board as a body corporate, or to provide that it may be sued, is no impediment in this proceeding; and it is also immaterial that the legislature has changed the composition of the Board and its plan of assessment.

**V.**

In equity appellant was not only a depositor of the Oklahoma Trust Company to the extent of the \$25,351.63, but, funds belonging to him in that

amount and also in the further sum of \$61,252.40 having been used to pay depositors, he became subrogated and is entitled to be treated as though he held assignments from the various depositors who were thus paid; hence the Banking Board should be required to pay him the \$25,351.63 and also such portion of the \$61,252.40 as may not be realized from the impounded securities or on the decree against the Union State Bank, together with legal interest.

## **BRIEF OF ARGUMENT.**

### **I.**

**The Banking Board does not represent the State of Oklahoma in true governmental capacity and therefore is not within the exemption from suit contained in the Eleventh Amendment.**

The directly pertinent statutory law of Oklahoma, in force at the date of the transactions under consideration and at the date of the institution of this suit, was an act that became effective May 26, 1908, and which now appears as an article in the Harris & Day Code of 1910, under the title "Banking Board", in full as follows:

298. *State banking board—powers.* The state banking board shall be composed of the governor, the lieutenant-governor, the president of the board of agriculture, state treasurer and state auditor. Said board shall have the supervision and management of the

depositors' guaranty fund, hereinafter provided for, and shall have power to adopt all suitable rules and regulations not inconsistent with law, for the management and administration of the same.

299. *Depositors' guaranty fund.* There is hereby levied against the capital stock of each bank and trust company organized or existing under the laws of this State, for the purpose of creating a depositors' guaranty fund, an assessment equal to five per cent. of its average daily deposits during its continuance in business as a banking corporation. Said assessments shall be payable one-fifth during the first year and one-twentieth during each year thereafter until the total amount of said five per cent. assessment shall have been fully paid: Provided, however, that the assessments heretofore levied and paid by banking corporations or trust companies now existing shall be deducted from and credited as a payment on said five per cent. assessment hereby levied. The average daily deposits of each bank during the preceding year shall be taken as a basis for computing the amount of the first payment on the levy hereby made. Each bank and trust company doing business under the laws of this State shall report annually to the bank commissioner the amount of its average daily deposits for the preceding year, and if such deposits are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank or trust company, having such increased deposits shall immediately pay into the depositors' guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as shown by such increased de-



posits. After the five per cent. assessment hereby levied shall have been fully paid up, no additional assessments shall be levied or collected against the capital stock of any such bank or trust company, except emergency assessments hereinafter provided, to pay the depositors of failed banks, and except such assessments as may be necessary by reason of increased deposits to maintain such fund at five per cent. of the aggregate of all deposits in such banks and trust companies doing business under the laws of this State.

300. *Same — emergency assessments.* Whenever the depositors' guaranty fund shall become impaired or be reduced below said five per cent. by reason of payments to depositors of banks which have failed, the state banking board shall have the power, and it shall be their duty, to levy emergency assessments against the capital stock of each bank and trust company doing business in this State sufficient to restore said impairment or reduction below five per cent.; but the aggregate of such emergency assessments shall not in any one calendar year exceed two per cent. of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all banks which have failed, having valid claims against said depositors' guaranty fund, the state banking board shall issue and deliver to each depositor having any such unpaid deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six per cent. interest. Such certificates shall be consecutively numbered and shall be payable upon the call of the state banking board, in like manner as state war-

rants are paid by the state treasurer in the order of their issue out of the emergency levy thereafter made; and the state banking board shall from year to year levy emergency assessments as hereinbefore provided against the capital stock of all banking corporations and trust companies doing business in this State until all such certificates of indebtedness with the accrued interest thereon shall have been fully paid. As rapidly as the assets of banks which have failed are liquidated and realized upon by the bank commissioner, the same shall be applied first after the payment of the expense of liquidation to the repayment to the depositors' guaranty fund of all moneys paid out of said fund to the depositors of such bank, and shall be applied by the state banking board towards refunding any emergency assessment levied by reason of the failure of such liquidated bank; Provided, that seventy-five per cent. of the depositors' guaranty fund shall be invested for the benefit of said fund in state warrants or other securities in which state funds are now required to be invested.

301. *New banks to pay three per cent. on capital stock.* Banks and trust companies hereafter organized shall pay into the depositors' guaranty fund three per cent. of the amount of their capital stock when they open for business, which amount shall constitute a credit fund, subject to adjustment on the basis of its deposits, as provided for other banks and trust companies now existing at the end of one year; Provided, however, that said three per cent. payment shall not be required of new banks and trust companies formed by the reorganization or consolida-

tion of banks and trust companies that have previously complied with this chapter.

302. *Commissioner to wind up affairs of banks, when.* Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors.

303. *Same—depositors to be paid, how.* In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust com-

pany, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund.

304. *Assets collected, etc.* The bank commissioner shall take possession of the books, records and assets of every description of such bank or trust company, collect debts, dues and claims belonging to it, and upon order of the district court, or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the stockholders, officers or directors: Provided, however, that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers or directors.

305. *Certificate of guaranty—advertisement.* The bank commissioner shall deliver to each bank or trust company that has complied with the provisions of this chapter a certificate stating that said bank or trust company has complied with the laws of this State for the protection of bank depositors, and that safety to its depositors is guaranteed by the depositors' guaranty fund of the State of Oklahoma. Such certificate shall be conspicuously displayed in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the depositors' guaranty fund of the State of Oklahoma:

Provided, however, that no bank shall be permitted to advertise its deposits as guaranteed by the State of Oklahoma; and any bank or bank officers or employees who shall advertise their deposits as guaranteed by the State of Oklahoma shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for thirty days or by both such fine and imprisonment.

306. *Stockholders may repair loss—bank reopened.* After the bank commissioner shall have taken possession of any bank or trust company which is subject to the provisions of this chapter, the stockholders thereof may repair its credit, restore or substitute its reserves, and otherwise place it in condition so that it is qualified to do a general banking business as before it was taken possession of by the bank commissioner; but such bank shall not be permitted to reopen its business until the bank commissioner, after a careful investigation of its affairs, is of the opinion that its stockholders have complied with the laws, that the bank's credit and funds are in all respects repaired, and all advances, if any, made from the depositors' guaranty fund fully repaid, its reserve restored or sufficiently substituted, and that it should be permitted again to reopen for business; whereupon said bank commissioner is authorized to issue written permission for reopening of said bank in the same manner as permission to do business is granted after the incorporation thereof, and thereupon said bank may be reopened to do a general banking business.

307. *State depositories.* Any bank or

trust company which has complied with the provisions of this chapter, or any national bank located in this State, shall be eligible to act as a depository of state funds, of any fund under the control of the State or any officer thereof, upon compliance with the laws of this State relating to the deposits of public funds.

It was amended by an act approved February 25, 1911, and was again amended by an act approved March 6, 1913. By these amendments the number of members of the Banking Board was reduced to four, and the Board was made to consist of the Bank Commissioner and three other members appointed by the Governor. Numerous provisions were added, and the plan of assessment was changed as shown by the following section of the act approved March 6, 1913:

“Section 3. There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this state an annual assessment equal to one-fifth of one per cent., and no more, of its average daily deposits during its continuance as a banking corporation for the purpose of creating a Depositors' Guaranty Fund; provided, that the State Banking Board, in their discretion, may levy an additional special assessment of one-fifth of one per centum as provided herein, during the fiscal years ending June 30, 1914; June 30, 1915; and June 30, 1916. Such fund so created shall be known as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act.



“The assessment for the year 1913 shall be payable immediately after this act takes effect, and thereafter the annual assessment shall become due and payable on the 11th day of March of each year, and all assessments shall be computed on the average daily deposits for the preceding year. Such assessments shall be paid by cashier’s checks, which checks shall be held by the Banking Board until in its judgment it is necessary to collect the same, but such checks shall not bear interest during the time they are so held.

“It shall be the duty of the Banking Board to keep an accurate account of the condition of the Depositors’ Guaranty Fund, showing all collections from assessments and assets of failed banks, and from all other sources together with the disbursements of said fund and the certificates of indebtedness outstanding, or other obligations chargeable against the same, and to send each bank operating under the laws of this state a quarterly financial statement showing the exact condition of the Depositors’ Guaranty Fund.

“When the Depositors’ Guaranty Fund shall amount to as much as two per cent. of the average daily deposits of the state banks, computed upon the last preceding annual statements of such average deposits of said state banks, over and above all certificates of indebtedness, or other obligations chargeable against the same, the annual assessment herein provided for shall cease, and thereafter it shall be the duty of the State Banking Board to keep and maintain said Depositors’ Guaranty Fund to the amount of two per cent. of such average daily deposits by making from time to time assessments against the capital stock of state banks op-

erating under the banking laws of this state, but such assessments shall not exceed one-fifth of one per cent. of the average daily deposits of any bank in one year except as otherwise herein provided during the fiscal years ending June 30, 1914; June 30, 1915; and June 30, 1916; and authority to make such assessments is hereby expressly conferred upon the said State Banking Board, and said board shall have authority to make all necessary rules and regulations not inconsistent with the laws of this state for the purpose of collecting and equalizing the assessments and the amount paid thereon among the banks operating under the banking laws of this state.

"If at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits of failed banks, or any other indebtedness properly chargeable against said Depositors' Guaranty Fund.

"Depositors' Guaranty Fund warrants of the State of Oklahoma shall bear six per cent. interest from date of issue, payable annually, and shall be issued in such form as may be prescribed by the Banking Board, and shall constitute a charge and first lien upon the Depositors' Guaranty Fund when collected, as well as a first lien against the capital stock, surplus, and undivided profits of each and every bank, operating under the banking laws of the State of Oklahoma to the extent of liability of any such bank to the De-

positors' Guaranty Fund under the provisions of this act, and said Banking Board shall have authority to negotiate or otherwise dispose of such Depositors' Guaranty Fund warrants, at not less than par value, in such manner as it may see fit to facilitate the liquidation of failed banks.

"All warrants heretofore issued by the Banking Board shall be paid serially in the order of their issuance from any funds on hand when this act takes effect or provided for by the terms of this act, and all warrants hereafter issued shall be in numerical order and retired in like order. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the State Banking Board, and by said board credited to the Depositors' Guaranty Fund. Quarterly, and on the dates provided for financial statements in this act, or oftener if deemed advisable, the Banking Board shall call for payment such outstanding warrants, if any, as can be liquidated from the available funds on hand. No corporation doing a trust business shall be liable for assessments to create or maintain the Depositors' Guaranty Fund, nor participate in the protection thereof in any manner whatsoever."

The statute was held valid by this Court in *Noble State Bank vs. Haskell*, 219 U. S., 104, 575.

At the outset of the discussion attention is called to the fact that no part of the funds of the Banking Board can ever reach the treasury of the State, and to the further fact that under no cir-

cumstances can any revenues of the State be used to discharge the liabilities of the Banking Board. The statutory provisions in reference to revenues and taxation, to the State treasury, and to the fiscal affairs of the State, will not be reviewed; they contain nothing that fails to confirm the statement just made. Indeed, the fiscal operations of the Banking Board are as distinct from those of the State as are the fiscal operations of counties, cities and towns. True, the salaries and expenses of the members are paid from the general revenue fund of the State; but this is equally true of the salaries and expenses of many officers of counties and other municipal organizations. The point is that this suit can have no effect upon the state itself or upon the funds or any property of the state. In the last analysis it is a suit against the State banks of Oklahoma. They have received the benefit of a fund belonging to appellant, and he is seeking restitution. The State is not interested and cannot become interested in any financial sense.

It is submitted, therefore, that the Banking Board is subject to suit and may be made to respond for its liabilities precisely as any other public board or municipality.

There is, to be sure, a class of torts for which such subdivisions of the state are not liable. But a well defined distinction exists in cases of this kind where the property of others has been taken. Mr. Justice Field expressed it thus in *Marsh vs. Board of Supervisors*, 10 Wall., 676:

“The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of

others without authority, the law, independent of any statute, will compel restitution or compensation."

That doctrine has been applied in many subsequent cases by the federal and state courts and is stated in the text-books as the law. 7 Am. & Eng. Enc. Law, 953; 11 Cyc, 497.

A discussion of the rule that counties may be sued will be found in *Lincoln County vs. Luning*, 133 U. S., 530.

The analogy to railroad commissioners also is good. Such commissions are created to regulate railroads and protect shippers; the Banking Board was created to regulate state banks and protect depositors. Orders made by railroad commissions do not affect the revenues which go into the state treasury; and the state treasury of Oklahoma is not affected in the least by any transaction of the Banking Board.

Mr. Justice Brewer, while on the circuit bench, noticed that such boards do not represent the state in its true governmental capacity. *Railroad vs. Day*, 35 Fed., 866.

And the doctrine of that case was afterwards adopted and applied by this court in the following cases, each of which shows an interesting development and extension of the doctrine. *Reagan vs. Farmers Loan & Trust Company*, 154 U. S., 363; *M., K. & T. Ry. Co. vs. Commissioners*, 183 U. S., 53; *Commission vs. Railroad*, 203 U. S., 335; and *Hopkins vs. College*, 221 U. S., 636.

It will be noted that Section 303 of the Oklahoma Act says that the State shall have, for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of failed banks; and the same

section also provides that liabilities of stockholders and officers may be enforced by the State for the benefit of the Depositors' Guaranty Fund. But it is noticeable that no amount thus realized can go to the public treasury; it is all for the benefit of the Depositors' Guaranty Fund.

In fair analysis the State is a mere trustee. Of course, the general welfare is involved to some extent. But the general welfare is involved when the State induces the construction of a railroad. Yet in such cases the State must become financially interested or there is no exemption of its officers from suit if they incur liabilities.

If there were a statute giving the State for the benefit of materialmen a lien on buildings erected no one would deny that materialmen could be sued.

The court considers the real party at interest in determining the exemption. *United States vs. Beebe*, 127 U. S., 338, 344, 345.

The decisions of this Court relied on by Judge Campbell in his opinion in the case at bar were rendered in suits involving funds or property that belonged to the State proper. Perhaps the strongest of these cases in support of his holding is *Murray vs. Distilling Company*, 213 U. S., 151. The suit there was against the Dispensary Commission of the State of South Carolina, and was held not maintainable. But the fund involved, or its residue, by express enactment of the legislature had been ordered turned over to the state treasurer. A considerable portion of the opinion of the court, delivered by the present Chief Justice, is devoted to a demonstration of the State's ownership. And it seems to have been contemplated that if the



State in its true governmental capacity had not been interested, if the property had not been purchased with funds from the state treasury originally, and if there had been no provisions whereby the residue would go to the state treasury and thus become the property of the State in the fullest sense, the suit could have been maintained.

In *State vs. Cockrell* (Okla.), 112 Pac., 1000, it was stated that the depositors' guaranty fund and the funds of a failed bank in the hands of the Bank Commissioner are as much funds of the State as is the common school fund.

The question involved in that case was whether the state Examiner and Inspector had authority to examine the office and records of the Bank Commissioner. The affirmative was ruled. This was based on two grounds. The first was that the guaranty fund was a fund of the State. The second was that it was a fund under the State's management. The statute provided that "the Examiner and Inspector shall examine the books and accounts of state officers whose duties it is to collect or disburse funds of the State or (under) its management at least once each year." After announcing the conclusion that the Depositors' Guaranty Fund is a fund of the State, the judge delivering the opinion said: "Even if it were not a state fund it would at least be a fund under the management of the State." He then went on to show that it must have been in contemplation of the lawmakers that the State Examiner and Inspector would have the right to check up the accounts and business of the Banking Board.

No one will question the correctness of the judgment there rendered. One might as well

question the right of the state officers to audit the books of a county. The right to provide for such audit in case of counties has always existed, and doubtless always will exist. It is a necessary part of the relation between the sovereign and such subdivisions of sovereignty. Likewise, the right of a state examiner and inspector to check up the records of a railroad commission is undeniable. But this does not militate against the fact that a county or a railroad commission is a distinct subdivision, and is suable for the enforcement of private rights.

It may be that the Public School Fund of Oklahoma is kept in a separate account, and is not blended in the general funds of the State. If that is true, the judge's statement may have been correct. Otherwise it was incorrect; for to say that a fund which by no possible means can reach the state treasury is as much a fund of the State as one directly belonging in the state treasury is palpably erroneous.

No criticism is here offered of the comparison of the Depositors' Guaranty Fund to the Public School Fund. It may be that they are in the same category. Possibly the one is as much the property of the State as the other. But if the language of the judge is relied on as meaning more than a comparison, as meaning that the Depositors' Guaranty Fund actually belongs to the State in its sovereign capacity, and as announcing that it is truly in every sense a fund of the State, it may not be out of place to reply that the language was not only unnecessary to the decision of that case, but was of the kind that the court must eventually recall.

That case was decided on November 29, 1910,

after the present suit had been filed. Having been rendered after the rights of these litigants accrued, the decision is not binding on this Court, although a statute of the State was construed.

*Burgess vs. Seligman*, 107 U. S., 20.

## II.

**But even if the Banking Board did represent the State it could not successfully claim here an exemption from suit since it owes the appellant a specific statutory duty.**

*Louisiana vs. Jumel*, 107 U. S., 711; *North Carolina vs. Temple*, 134 U. S., 22; and *Louisiana vs. Steele*, 134 U. S., 230, are cases cited in support of the proposition that the Board can not be required in this judicial proceeding to recognize the complainant as a depositor and levy assessments for his payment. These cases are grouped here because they are easily distinguishable on one and the same ground. In *Louisiana vs. Jumel* the auditor and treasurer of the State had refused to pay the complainants' coupons, issued in 1874 under act passed during that year, and the ground of refusal was "that they could not comply with the request made of them, owing to the prohibition contained in Article III, State Debt Ordinance of the Constitution of the State of Louisiana, adopted 23rd July, 1879, and recently promulgated." In each of the cases of *North Carolina vs. Temple* and *Louisiana vs. Steele* the State had likewise expressly enacted

through its legislature that the very thing sought to be compelled by the mandamus, namely, the collection of taxes for the payment of bondholders, should not be done. The purpose of the suits was to compel officers of the State to disobey later in obedience to earlier enactments. Neither case was one where the state officers were refusing to obey the legislature's latest admonition. On the contrary it was their obedience to the legislative edict that was complained of. And to those cases may be added another which is of the same class and frequently cited, namely, *Hagood vs. Southern*, 117 U. S., 52.

*Ex parte Ayres*, 123 U. S., 443, was an injunction suit, and Ayres, who was attorney general of the State of Virginia, was ruled for contempt for violating the writ. Suit had been brought by one Cooper to enjoin Ayres and other state officers from enforcing a recent statute of the State whereby bonds issued under an earlier statute were limited in their use for the payment of taxes, this limitation being alleged to be contrary to the provisions of the earlier statute. It was ruled that the court was without jurisdiction and that the writ of injunction was invalid, because the attorney general was merely carrying out the statute of the State and it was in effect an injunction against the State. Cooper was in position to invoke only the earlier statute, which was superseded by the later one, and, of course, he was unable to say that the state officers were failing to do for his benefit that which the existing statute required. The performance of the plain ministerial or statutory duty, as it stood at the time the suit was brought, was what he desired to prevent.

In none of these cases was there a clear and unrepealed statutory requirement that the state officers should do the specific thing which the complainant sought to require them to do.

Smith *vs.* Reeves, 178 U. S., 436, is another case cited by Judge Campbell. The State of California had passed a law which required each corporation, person or association assessed by the state board of equalization to pay taxes as assessed, but coupled with this enactment was a provision that any one claiming that taxes had been illegally collected of him could recover back the amount by a suit against the state treasurer in the superior court of the county of Sacramento. Smith, as receiver of the Atlantic & Pacific Railway Company, brought an action against Reeves as a treasurer of the State, but filed it in the United States Circuit Court. His recovery was denied on the ground that the State in giving its consent to be sued had limited it to suits in the superior court of the county of Sacramento. An attentive reading of the opinion and of the statute quoted in the opinion will show that there was absolutely no promise of the State or statutory enactment of its legislature to the effect that any taxes would be refunded except that the claim first be asserted by a suit in the superior court of the county of Sacramento. Hence the complainant, when bringing his suit in the federal court, had no promise or statute of the State in his favor. He was not in the attitude of one invoking a statute and demanding that the officers of the State perform the plain mandate of the statute. He was wholly beyond and outside of the operation of the statute of California, and standing in the federal court was in the attitude

of having no right of recovery except by virtue of the naked fact that he had paid too much taxes. It did not lie in him to mention the statute, because he was not within its terms. Surely there is no necessity of arguing the proposition that one who pays too much taxes can not sue the State or its officers to recover them back, in the absence of an applicable statute. It was always the law, and the trouble in that case was the same as in the others; there was no applicable statute in the complainant's favor.

Section 303 of the Oklahoma Statute provides that when the Bank Commissioner takes possession of any bank subject to the provisions of the act, the depositors shall be paid in full; and the same and other sections make it the duty of the Board to collect funds, levying emergency assessments when necessary, to pay the depositors of failed banks.

This is an imperative and not a discretionary duty, and it is a different case from one where there is no applicable statute, and more different from one where a statute prohibits the thing sought to be accomplished.

Beginning with the very early decision of *Maybury vs. Madison*, 1 Cranch, 137, the federal courts have held that the performance of plain ministerial or statutory duties may be compelled by mandamus at the suit of an individual, although the party upon whom the writ operates is the Secretary of State or some other representative of the sovereignty.

In *Board of Liquidation vs. McComb*, 92 U. S., 531, the rule was thus stated by Mr. Justice Bradley:



"The objections to proceeding against state officers by mandamus or injunction are: First, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance."

In *United States vs. Schurz*, 102 U. S., 378, the complainant was awarded mandamus to require the Secretary of the Interior to deliver a patent, and the authorities in support of the ruling were reviewed at length by Mr. Justice Miller. It was held that where the officer owes the complainant a plain statutory duty he may be required to perform it, even if in so doing he does act for the Government.

Then in a few years the case of *Cunningham vs. Railroad*, 109 U. S., 446, came before the court, and Mr. Justice Miller, though holding that the particular suit could not be maintained, took pains to lay down three classes of cases to which the rule of that case did not apply. After defining the first two classes he said:

"A third class, which has given rise to more controversy, is where the law has im-

posed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."

In the more recent case of *Graham vs. Fulson*, 200 U. S., 248, certain judgment creditors of a township, whose judgment was founded on bonds issued in favor of a railroad, sought by mandamus to compel county officers to levy and collect a tax to satisfy their judgment. It was contended that those officers represented the State, and, on authority of *Louisiana vs. Jumel* and similar cases, that they could not be coerced into the performance of their duty to the complainant. But the court held otherwise, and affirmed a judgment awarding the writ, although the act creating the township had been repealed and the township abolished.

The foregoing were in the main cases in which officers of a State were required by mandamus to affirmatively perform fixed duties to the citizen.

Many injunction cases have been decided involving the same principle.

In *Rolston vs. Missouri Fund Commissioners*, 120 U. S., 390, the trustees in a mortgage made by the Hannibal & St. Joseph Railroad Company sought to restrain the executive officer of the State from selling mortgaged property under a prior statutory mortgage in favor of the State on the ground that the liability for which the earlier lien was created had been satisfied, and

that they, as trustees, were entitled to an assignment of the lien. The question of whether the suit was in effect a suit against the State and prohibited by the Eleventh Amendment arose. The court, speaking by Chief Justice Waite, said:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the eleventh amendment of the Constitution of the United States, and *Louisiana v. Jumel*, 107 U. S., 711 (2 Sup. Ct., 128; 27 L. Ed., 448), is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state."

That is the key note. It is the very distinction. *Louisiana vs. Jumel* and cases of its kind are assigned their proper places. They are put apart from cases where the officer is not representing, but is misrepresenting, the state.

The Circuit Court of Appeals for the Eight Circuit also considered that aspect of the matter in *Huidekoper vs. Hadley*, 177 Fed., 1.

The relator there owned bonds issued in payment of a subscription to a railroad and payable only out of taxes on property in Macon County, Missouri, as levied and collected over and above certain amounts for state and local purposes. The annual equalization of values for that county, made by the State Board of Equalization, when considered in connection with statutory limits to tax rates, was such as to enable him to collect

nothing on his bonds. While the statutes of the State required full renditions, property in Macon county was placed at less than its actual value. This was done for the purpose of keeping collections down so that the relator could realize nothing, and a majority of the State Board of Equalization would not allow a full valuation to be placed. The Circuit Court dismissed the petition on two grounds: (1) Because the suit was one against the State of Missouri, and (2) because it was an effort to have the court review the discretion of the defendants, the members of the State Board of Equalization. In reversing on both grounds the Circuit Court of Appeals through Judge Adams restated and applied the doctrine of *Rolston vs. Missouri Fund Commissioners*, as follows:

“This brief epitome of legislation clearly disclosed that the policy of the state requires property to be assessed on the basis of its true value in money, and that a duty is cast upon the State Board to equalize the property among the several counties of the state on that basis. Without now discussing the exact nature of that duty, its extent, or its limitations, it is sufficient, for our present purpose, to observe that it is an imperative duty imposed by the law of the state. A majority of its members constituting a working quorum refused to permit the board to perform that duty and compelled it to decline to do so. In so acting they did not stand for the state of Missouri and were not the state within the meaning of the eleventh amendment of the Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its

laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state. This suit, therefore, instead of being against the state, is against its servants to compel them to do a duty which, by accepting office, they agreed to perform."

From the inception of the doctrine invoked by appellees the test has always been whether the desired relief could be afforded without interfering with the true governmental functions of the state. Any board or subdivision of the sovereignty can be required to perform a positive statutory duty to the complaining suitor if it is consistent with all legal duties to the state as a state. A shield of wrong cannot be made of the Eleventh Amendment.

There is no question of exempt discretion involved here. The statute is perfectly plain as to what the Board shall do and how it shall be done. If the Board is in funds the duty is to pay the depositor. If it is out of funds, the duty is to levy an assessment, and the statute says how the levy shall be made.

Nor can the fact that the deposit was not in appellant's name, or that he was not directly a depositor but is merely subrogated to the rights of depositors, operate to shield the Banking Board. For, appellant could have brought separate proceedings and compelled the making of transfers to him. In one instance he would have required the Oklahoma Trust Company as trustee to assign to him its deposit in the Oklahoma Trust Company as a bank. In the other he would have required other depositors, to the amount of

his money that they received, to assign to him their claims. There would then be a plain straight action on a depositor's claim. Of course a court of equity will require no such circuitry. Moreover, the decree of *pro confesso* silences the only one who could possibly raise a question.

It would be most extraordinary if state officers, by merely interposing objections or raising questions of law or fact, which always can be done, could place themselves beyond the reach of process. They cannot do it; when a case is presented the court may hear the evidence and consider the law, and if the complainant's theory is sustained and it is found that the officers owe him a specific statutory duty, they may be coerced by decree. By statutory duty is meant not the appearance on the surface, but the obligation which may spring from the statute by an application of the rules of jurisprudence. It would be a hard rule here if the Court were deterred from giving effect to the principles of subrogation. It would be as if no evidence could be weighed, for as between considering evidence and applying the principles of equity there is no difference of extent in the function of the Court. Subrogation in equity is as much to be recognized as the truth that two and two are four. And one of the beauties of subrogation is its adaptability. New situations are constantly arising, calling for novel applications of the principle. The first question always is, What is just? The motto is *Ubi jus, ibi remedium*. If without doing violence to precedents, or going contrary to the logic of the legal mind, a new application of the rule can be made, a court of equity is eager to do so, if it will serve to redress a wrong.



Support of these observations and of the proposition that the existence of a controversy on the law or the facts will not operate to protect the Board from suit will be found in the Rolston Case, 120 U. S., 390, where it was said:

“The law makes it his duty to assign the liens in question to the Trustees when they make a certain payment. The Trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the Trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the Trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for.”

### III.

**Moreover, by participation in the former suit and interference with the process of the Court the Banking Board waived any exemption from suit which otherwise it might have claimed.**

Gunter *vs.* Atlantic Coast Line, 200 U. S., 273, 292.

Attention is again invited to the fact that the present suit is ancillary and supplementary to

the former suit (R., 3-14); that a restraining order was issued in that case against the use or dissipation of any portion of the proceeds of the paving bonds (R., 53-54); that later a mandatory order was issued requiring the Oklahoma Trust Company and all other persons having any of these proceeds to deliver the same to the representative of the court (R., 62); and that in the final decree the Oklahoma Trust Company was peremptorily commanded to forthwith deliver to the complainant the entire amount (R., 37). Also to the further fact that the Banking Board employed an attorney to defend that suit so far as it would in any way affect the Banking Board, and that under this employment an answer was filed for the several defendants and the proceeding was resisted to the moment of final decree and to the point of an exception and notice of appeal (R., 149). Also to the still further fact that while the suit was pending, and while the restraining order was in force, the Bank Commissioner took charge of the Oklahoma Trust Company and caused it to make the transfer of January 3, 1910, under which the funds were diverted in violation of the orders of the Court (R., 25).

It is hardly conceivable that any State would knowingly interfere with the orders and process of a court of the United States, or having unintentionally interfered would persistently refuse to remedy the wrong. Nevertheless the record in this case shows a course of the one kind or the other, if the transactions of the Bank Commissioner and the Banking Board are attributable to the State. If they did not know the facts on January 3, 1910, they knew them very soon afterwards. Instead of making restitution they ap-

peared in the case in disguise and participated in the litigation. Then when the decision was against them and a proceeding was brought to enforce the decree they claimed to be the State.

If operations of that kind are to be tolerated it means that the judicial power of the national courts, though in full operation upon a subject matter, may be paralyzed by the action of the state authorities. If state officers can do that which was done in this instance they can seize any receiver or the marshal of the Court and take from him the funds of a litigant that may happen to be in *custodia legis* and the owner of the funds will have no redress. The only thing necessary to make the wrong complete and final in any case would be its approval by the Governor or the Legislature.

It is confidently submitted that the principle of the case cited immediately after the statement of the proposition is controlling here.

#### IV.

**The fact that the statute fails to classify the Banking Board as a body corporate, or to provide that it may be sued, is no impediment to this proceeding; and it is also immaterial that the legislature has changed the composition of the Board and its plan of assessment.**

The Banking Board admitted in its answer that it was "a body corporate or organization

under the laws of the State of Oklahoma" (R., 21). And the new Board appeared at different stages of the proceeding (R., 194-198).

It is considered sufficient in support of the proposition to cite three cases.

Murphy *vs.* Utter, 186 U. S., 95;

Graham *vs.* Fulsom, 200 U. S., 248;

Huidekoper *vs.* Hadley, 177 Fed., 1.

## V.

In equity appellant was not only a depositor of the Oklahoma Trust Company to the extent of the \$25,351.63, but, funds belonging to him in that amount and also in the further sum of \$61,252.40 having been used to pay depositors, he became subrogated and is entitled to be treated as though he held assignments from the various depositors who were thus paid; hence the Banking Board should be required to pay him the \$25,351.63 and also such portion of the \$61,252.40 as may not be realized from the impounded securities or on the decree against the Union State Bank, together with legal interest.

Really, the present proposition goes to the merits of the case more than to the question of jurisdiction. And while it is true that the Dis-

trict Court was ready to decide the merits in favor of appellant, except for the supposed lack of jurisdiction, all of which is shown by the fifth and sixth paragraphs of the decree, there may be no impropriety in outlining further, yet briefly, appellant's theory of subrogation.

In the beginning he had a first lien on the paving bonds, and the Oklahoma Trust Company had a second lien. By the terms of a contract the Oklahoma Trust Company had the privilege of purchasing these bonds, but in that event it was to pay appellant for them simultaneously with their acceptance. Under this state of facts its act in taking the bonds and trying to make away with them without paying the agreed price gave it no title. It was like the familiar case of a merchant purchasing goods to be paid for on delivery and gaining possession without making payment. Such an acquisition is no acquisition; the taker obtains no title, and the original owner or any lien holder may treat the ownership as unaffected and follow the property. That rule was applied in the main suit where the court not only granted an order restraining the Oklahoma Trust Company from using the bonds, or in any way diverting the proceeds, but by final decree adjudged that the complainant had a first and superior lien on the proceeds.

Appellant's contention that he became entitled to subrogation is not limited to the securities that were released in Kansas City and Chicago by the use of funds to which he was entitled, but extends to the whole of his claim against the Banking Board. In other words, he has traced to the Banking Board a fund of \$86,604.03, made up of \$25,351.63 received by the Oklahoma Trust Company

in November, 1909, and \$61,252.40 received by that company in January, 1910. Both amounts were used under the direction of the Banking Board in the payment of depositors, that is, they were turned over to the Alamo State Bank as a part of the consideration for and as a part of the means with which the latter should and subsequently did pay depositors to the amount of \$448,585.37. And appellant contends that he has two securities, one in the impounded collaterals, and the other in his recourse against the Banking Board.

It will be seen from the record that there was no proof showing that between the time it received the \$25,351.63 in November and the date when it went into the hands of the Bank Commissioner in January the Oklahoma Trust Company had on hand less than that amount of cash, its cash and cash items on hand at the latter date being \$72,159.64; and therefore it is proper to say that the \$25,351.63, as well as the \$61,252.40, was used to pay depositors, or was used as the consideration to induce their payment. As a result of this it ceases to be very material whether the passing of the \$25,351.63 to the credit of the Oklahoma Trust Company as trustee made appellant a depositor. Its receipt of the money and the use finally made of it entitled him to be subrogated to the rights of depositors.

The situation of the Banking Board on January 3, 1910, was one of responsibility to all the depositors of the Oklahoma Trust Company. At that time no part of our trust fund had been used. It was all intact. Subsequent transactions have had what effect? It is apparent that the resources of the Board were increased to the full extent of the \$86,604.03. It got that much money more



than it was entitled to and was spared the necessity of levying assessments to that extent. Stated otherwise, the complainant's money was used to induce and compensate the Alamo State Bank to pay depositors whom otherwise the board would have been compelled to pay, and it is but simple justice that the complainant should be reimbursed. A fair way to view the matter, it is thought, is to consider this a claim against the Depositors' Guaranty Fund or against the state banks of Oklahoma. The Guaranty Fund and the banks obtained the benefit of the complainant's money, and they are not unduly hurt when required to reimburse him. The decree may fall on them. But it should.

The rule of subrogation is not limited to cases where liens exist. *Hardaway vs. National Surety Company*, 211 U. S., 552; *Prairie State Bank vs. United States*, 164 U. S., 227; 37 Cyc., 414 (3), 416 (note 11); 27 Am. & Eng. Enc. Law, 212 (d), 265, 267.

If A's money is stolen by B, and is used to buy property, A has a right to the property. Or, if A's money is used by B to pay the latter's debt, A is subrogated to the creditor's remedies, even though it is a plain debt and there is no lien to enforce. Nor is it necessary, when subrogation is sought because of the misuse of a trust fund, to show that the identical coin, or even the identical fund, was directly employed in making a payment. If A comes into possession of B's coin, and with it buys a bill of exchange, and with the bill of exchange purchases goods or land, and then lets C have the goods or land in consideration of C paying a judgment against A, the chain is complete and there is a perfectly plain case for sub-

rogation in favor of B. He can claim all benefits of the judgment on the ground that his money was the effectual means that accomplished the payment, and this although C, in the particular transaction of payment, may have employed funds from other sources.

And so in the case at bar it is respectfully submitted that depositors were paid with appellant's money just as truly as if marked bills had been taken from his pockets and handed to them over the counter, and that for the Oklahoma Trust Company to turn his funds over to the Alamo State Bank as the consideration *pro tanto* for the payment of depositors by the latter was in legal effect the same as if the funds had been exchanged for a bank draft and the depositors had been paid with the draft.

Here in conclusion, and as a matter of simple justice, it is believed that mention should be made of the fact that the official acts herein criticised were not those of the present administration, but were those of a prior administration, of the State of Oklahoma.

May the decree appealed from be reversed in the respects mentioned in the assignments of error with direction to the District Court to enter a decree in accordance with the proposition.

AMOS L. BEATY,  
*Counsel for Appellant.*

August 12, 1914.

Office Supreme Court, U. S.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

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No. 448.

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W. S. FARISH, APPELLANT,  
VS.

STATE BANKING BOARD AND BANK COMMISSIONER OF THE STATE OF  
OKLAHOMA ET AL.

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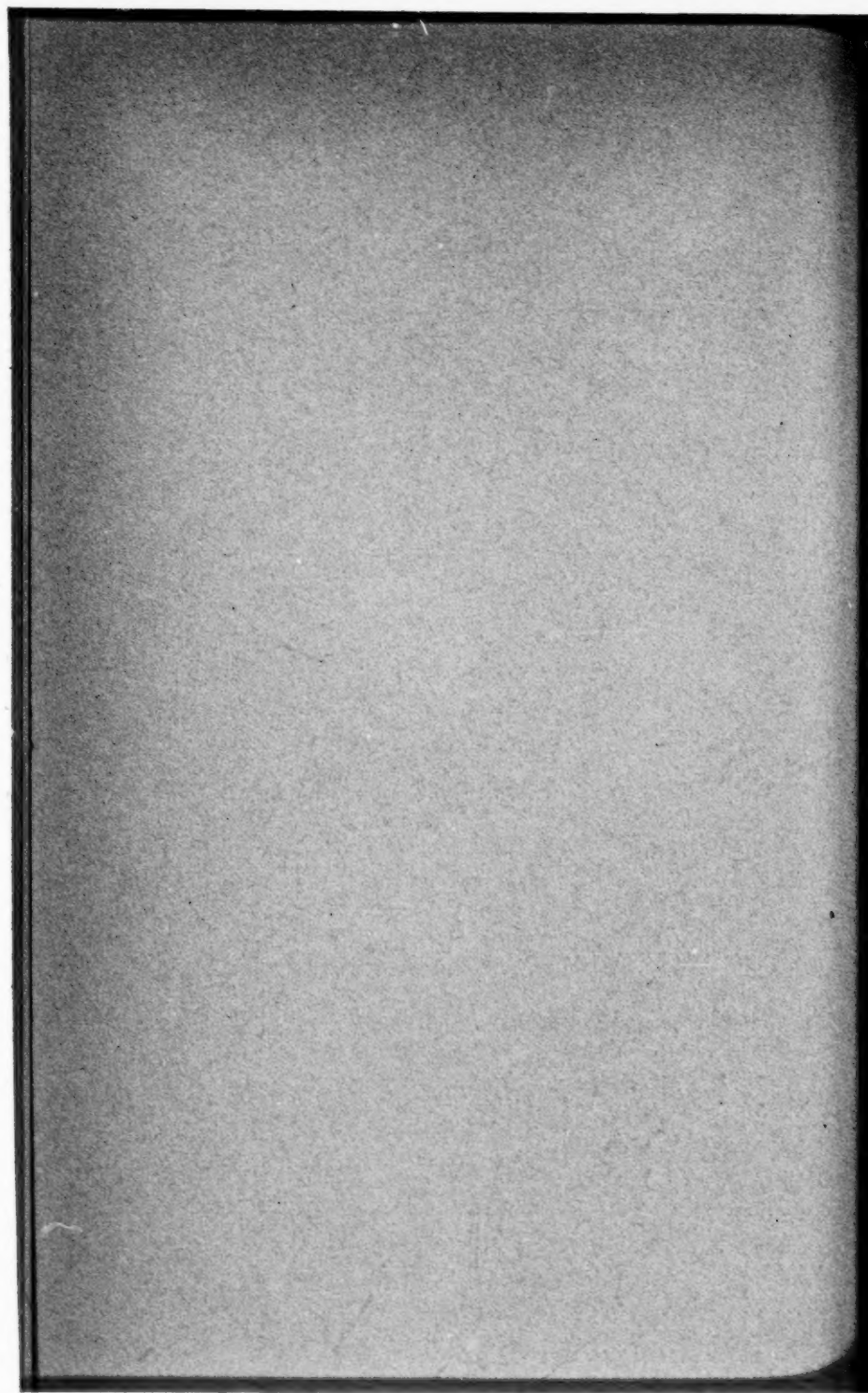
Appeal from the District Court for the Eastern District of Oklahoma.

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BRIEF FOR APPELLEE.

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WALTER A. LEDBETTER,  
HARRY L. STUART,  
ROBT. R. BELL,  
*Counsel for Appellee.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1914.

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**No. 446.**

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W. S. FARISH, APPELLANT,  
VS.  
STATE BANKING BOARD AND BANK COMMIS-  
SIONER OF THE STATE OF  
OKLAHOMA ET AL.

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Appeal from the District Court for the Eastern Dis-  
trict of Oklahoma.

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**BRIEF FOR APPELLEE.**

At page 2 of the Brief for Appellant it is stated that one of the objects of this suit was the compulsion of the Banking Board of the State of Oklahoma to pay to the complainant as *equitable depositor* of the Oklahoma Trust Company, a failed banking institution, the sum of \$25,351.63, and that another object was subrogation and

the establishment and enforcement of liens in the amount of \$61,252.40 upon certain funds and impounded securities, with a decree against the Banking Board for any deficiency or unpaid balance.

The ninth paragraph of the prayer to the bill was that the complainant having a decree against the State Banking Board requiring and compelling it to administer assets in its hands so as to preserve and protect the rights of complainant and requiring it to pay them the amount ascertained to be owing therefrom and, if necessary, to make an assessment for the payment of any balance of this debt, and for such other and further relief as may be applicable to equity.

It appears from the allegations of the complaint that the first item referred to resulted from the appropriation by the Oklahoma Trust Company of the proceeds of certain paving bonds. This amount was indicated on the books of the Bank by a memorandum as "Oklahoma Trust Company, Trustee Account, \$25,351.63." (Trans. p. 30.) Demand having been made for this amount of the Oklahoma Trust Company and it having refused the payment, the relation between the Trust Company and the assignor of the complainant was not that of an ordinary banker and depositor, but the Trust Company became trustee *mala ficio*. It was a *tort feasor*. It is unnecessary to go into the history of this item further than to say that its ownership to the fund was in dispute, the assignor of the complainant claiming the money and the McNerney Company claiming it. The Oklahoma Trust Company had sold and converted to its own use paving bonds and, when the dispute arose over the ownership of the money, it simply made the memorandum above quoted on its books, but refused to pay the money to either of the claimants. It was liable to the rightful owner of the



money for the amount, but the money was in no sense an ordinary deposit.

By the decree of the Court below it was determined that the Texas Company was the owner of this money and that its assignee, the complainant in this case, is entitled to recovery, but neither the Texas Company nor the complainant deposited the amount in the Oklahoma Trust Company.

Nor can it be said that the other item amounting to \$61,252.40, involved in this controversy, was ever a deposit in the Oklahoma Trust Company. The history of this item is very fairly given in the Brief for Appellant, from which it appears that certain paving bonds, on which it may be said the complainant or his assignor had a prior lien, were wrongfully converted by the Oklahoma Trust Company and the proceeds of the bonds, after the wrongful conversion, illegally applied by the Oklahoma Trust Company to the payment of certain debts, representing money borrowed by the Oklahoma Trust Company, in one instance from the Hamilton National Bank of Chicago, and in another from the Commerce Trust Company of Kansas City, Mo., and when this borrowed money was paid the collaterals described in the Bill of Complaint were discharged and they found their way into the Alamo State Bank, which had succeeded to the ownership of the assets of the Oklahoma Trust Company.

The purpose of this suit was to enforce subrogation against these assets and this is the effect of the decree, but complainant was not satisfied with the decree against the Oklahoma Trust Company and against the Alamo State Bank subrogating complainant to the rights of the Hamilton National Bank and the Commerce Trust Company in their liens upon the pledged assets, but because the Banking Board administered the assets of the Okla-

homa Trust Company and the Alamo State Bank, the complainant sought a decree establishing a money judgment against the Banking Board and some sort of an order substituting the Court for the Banking Board in the administration of the depositors' guaranty fund and the assessment of the State banks in Oklahoma until the money judgment was satisfied. This the Trial Court refused to do. It will be recalled from the Record that all of the assets pledged to the Hamilton National Bank and to the Commerce Trust Company, which were discharged by the payment of the proceeds of the paving bonds and which could be identified, were held subject to the complainant's lien. These assets were placed in the hands of trustees and have in part been collected and proceeds made available to satisfy complainant's debt. This is sufficient recital of the history of complainant's claim to show that it is not an ordinary deposit in a bank.

### **Brief of Argument.**

#### **I.**

For convenience we will reverse the order of argument as contained in the Brief for Appellant and dispose of the fifth proposition, which counsel discussed, and that IN EQUITY THE APPELLANT WAS NOT ONLY A DEPOSITOR OF THE OKLAHOMA TRUST COMPANY TO THE EXTENT OF \$25,351.62 BUT FUNDS BELONGING TO HIM IN THAT AMOUNT AND ALSO IN THE FURTHER SUM OF \$61,252.40 HAVING BEEN USED TO PAY DEPOSITORS, HE BECAME SUBROGATED AND IS ENTITLED TO BE TREATED AS THOUGH HE

HELD ASSIGNMENT FROM THE VARIOUS DEPOSITORS WHO WERE THUS PAID; HENCE THE BANKING BOARD SHOULD BE REQUIRED TO PAY HIM THE \$25,351.63 AND ALSO SUCH PORTIONS OF THE \$61,252.40 AS MAY NOT BE REALIZED FROM THE IMPOUNDED SECURITIES OR IN THE DECREE AGAINST THE UNION STATE BANK TOGETHER WITH LEGAL INTEREST.

We submit that the Oklahoma Supreme Court, by its decisions, has established the rule that the depositors' guaranty fund created under banking laws of that State by the compulsory assessment of State banks is not liable for any debt except that of the ordinary depositor; that that fund is created not for the benefit of the general creditors of the State bank, nor for any persons to whom the bank might become liable by reason of the torts of its officers, nor upon any obligation whatever except that arising from the ordinary relation which is created when one of its customers deposits his money in the bank.

In the case of the Columbia Bank & Trust Company vs. the United States Fidelity & Guarantee Company, 33 Oklahoma, 535, it was held that the depositors' guaranty fund was not liable for the deposits of State school funds for the reason that, under the statutes of Oklahoma, certain specified securities were required to be taken when such fund was deposited.

In the case of Lankford Bank Commissioner vs. the Oklahoma Engraving & Printing Company, 35 Oklahoma, 404, it was held that the depositors' guaranty fund is not liable for a debt due an ordinary "merchandise creditor" of the failed bank. After referring to the case of the Columbia Bank & Trust Company vs. United

States Fidelity & Guarantee Company, *supra*, and the reasoning on which that case is based the court said:

"This reasoning applies to the defendant in error, who was not a creditor of the bank in the sense that a depositor was and hence admittedly not entitled to be paid out of the depositors' guaranty fund. The depositors' guaranty fund was created for the payment of depositors only as defined in Columbia Bank & Trust Company vs. the United States Fidelity & Guarantee Company."

In the very recent case of Charles W. Lovett et al., vs. Lankford et al., decided by the Oklahoma Supreme Court on September 29, 1914, it was held that the money of a county deposited in a State bank and secured by Surety Company bonds in accordance with the requirements of the Oklahoma statutes governing such deposits, did not constitute a deposit within the meaning of the statutes of Oklahoma which create that fund. On this point the court said:

"It cannot be seriously questioned that under the Bank Guaranty Law, as construed by this court in the case of Columbia Bank & Trust Company case, *supra*, no State funds deposited in the manner provided by law in any bank are protected by the bank guaranty fund. The principle distinction which can be made under the law governing the deposit of State funds and that of county funds is that the State treasurer, with the approval of the governor and attorney general, is to select the depositories for State deposits; and such depositories shall pay interest on the State funds at the rate of three per cent; and as additional security, the State treasurer is authorized to take first mortgage bonds on farm lands, but is pro-

hibited from taking surety company bonds; while in making deposits of county funds, the county commissioners are to select the depositories and are permitted to accept surety bonds, but are not authorized to accept first mortgage bonds on real estate. In the deposit of State funds, the governor, attorney general and the State treasurer are to approve the securities; in the deposit of county funds, a commission composed of the county judge, county attorney and county clerk shall pass upon and approve the securities. In principle, in construing and applying this provision of the law it will be seen that there can be no real distinction made between a deposit of State funds in a depository authorized to receive the same, and that of county funds; and this is true, whether this court in that case placed its decision upon the ground that the school fund there was otherwise secured, or on the ground that the statute providing for the deposit of the school funds was a specific provision relating to a special subject, and both acts were passed at the same session of the legislature, or if the deposit there was a special and not a general deposit, or if it was upon all the grounds mentioned. This court, in the Columbia Bank & Trust Company case, *supra*, in effect, held that the deposits of the State were not general deposits, covered and protected by the depositors' guaranty fund. So, we hold in this case that the same rule applies to the deposits of Creek County, made in pursuance to the provisions of the statute, prescribing and providing for ample securities, and directing them to be made under strict legislative safeguards, does not come within the meaning of a general deposit, under section 1540 Rev. Laws, 1910, protected and covered by the depositors' guaranty fund." (See certified copy of decision in case of Lovett et al., vs. Lankford et al., on file in case J. D. Lankford et al., vs. Plate Iron Work Co., No. 381.)

## II.

The first and second propositions discussed by counsel for Appellant will be treated by us as one proposition. That is the two propositions merged into one are that *the Banking Board does not represent the State in two governmental capacities and is not within the exemption from suit contained in the 11th amendment of the Federal Constitution, but even if the Banking Board did represent the State it could not claim in this action an exemption from suit because it owes the appellant a specific statutory duty. The latter proposition has clearly been disposed of by the decision of the Supreme Court of Oklahoma in the case of State vs. Cockrell, 102 Pac., 1000.*

The court in that case said:

"That the Bank Commissioner is a State officer has not been and cannot be questioned. That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the State as the common school fund, is also true. The depositors' guaranty fund act was sustained by this court on the theory of the reserve power of the State to alter and amend charters of State banking corporations for the public welfare of the people of the State. \* \* \* This power exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this State \* \* \* \* equal to five percentum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks (section 3,



article 2, c. 5, pp. 121-123, Sess. Laws, 1909), is the same as that which levies, or causes to be levied, a tax upon the people and property within the State for the maintenance and support of the common schools and educational institutions. 'The title of such depositors' guaranty fund vests in the State just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the State for a specific purpose.'

And in the case of *Lovett vs. Lankford*, decided on September 29, 1914, the Oklahoma Supreme Court quotes *State vs. Cockrell*, with approval, reiterates the doctrine therein contained and holds that the depositors' guaranty fund is one of the public funds of the State to be administered to promote the public welfare of the State in the exercise of police power. That case is directly in point because it was there held that the depositors' guaranty fund is a public fund of the state in an action in which an alleged depositor was endeavoring to subject that fund to the payment of his debt, but the court held that the Banking Board was not subject to suit for that purpose while engaged in the administration of this public fund.

The depositors' guaranty fund being one of the public funds of the State, created for the taxing power and administered by the public officers of the State, enjoys the same exemption from judicial control as any other public fund which is subject to legislative control. After referring to the nature of the claims of the complainant against this fund, Judge Campbell, in holding that his court was without jurisdiction to render judgment controlling the administration of this fund, said:

"If in such a suit the state, though not nomin-

ally a party, is a real party in interest as defendant, then it must follow that the case falls within the prohibition of the Eleventh Amendment. *In re Ayers*, 123 U. S., 505. In *Pennoyer vs. McConaughy*, 140 U. S., 1, where many former cases of the Supreme Court relative to this question are reviewed, it is said:

"The question, then, of jurisdiction is first presented for determination. Is this suit in legal effect one against the State, within the meaning of the Eleventh Amendment to the Constitution? A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication, and as might naturally be expected in view of the important interests and the wide-reaching political relation involved, the dissenting opinions have been numerous. Still the general principles enunciated by the adjudications will, upon review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon.

It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State without its consent, even though the sole object of such suit be to bring the state within the operation of the Constitutional provision, which provides that: "No State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against the state itself.

In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is where the suit is brought against the officers of the state as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. *In re Ayres*, 123 U. S., 443; *Louisiana vs. Jumel*, 107 U. S., 711; *Antoni vs. Greenhow*, 107 U. S., 769; *Cunningham vs. Macon & Brunswick R. R.*, 109 U. S., 446; *Hagood vs. Southern*, 117 U. S., 52.

The other class is where a suit is brought against defendants, who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or form compensation in damages, or in a proper case where the remedy at law is inadequate for an action to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn vs. Bank of the United States* 9 Wheaton, 738; *Davis vs. Gray*, 16 Wall., 203; *Tomlinson vs. Branch*, 15 Wall., 460; *Litchfield vs. Webster County*, 101 U. S., 773; *Allen vs. Baltimore & Ohio R. R.*, 114 U. S., 311; *Board of Liquidation vs. McComb*, 92 U. S., 531; *Poindexter vs. Greenhow*, 114 U. S., 270.

After reviewing a number of decisions of the Supreme Court, in which suits against State officers individually were held not to be in effect suits against the State, it is further said in this case :

'The dividing line between the cases to which we have referred and the class of cases in which it has been held that the State is a party defendant, and, therefore, not suable by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham vs. Macon & Brunswick R. R.*, where it was said, referring to the case of *Davis vs. Gray*, *supra*: "Nor was there in that case any affirmative relief granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of the company." 109 U. S., 453-454. Thus holding, by implication at least, that affirmative relief would not be granted against a State officer by ordering him to do and perform acts forbidden by the law of a State, even though such law might be unconstitutional.

The same distinction was pointed out in *Hagood v. Southern*, which was held to be in effect a suit against the state, and it was said: "A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law, or suits in equity are maintained against defendants, who, while claiming to act as officers of the state, violate and invade the personal property rights of the plaintiffs under color of authority unconstitutional and void." 117 U. S., 52-70.'

Referring to *In re Ayres*, 123 U. S., 443, which

is reviewed, it is further said in relation to that case:

'In delivering the opinion of the court, Mr. Justice Matthews, referring to the class of cases in which it had been adjudged that the suit was against state officers in their private capacity, and not against the state, said:

'The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. \* \* \* This feature will be found on an examination to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a state or of the United States, where the objection has been interposed that the state was the real defendant, and has been overruled.'" 123 U. S., 500-501.

In *Smith v. Reeves*, 178 U. S., 436, the receivers of a railroad company sued the defendant as treasurer of the State of California, in the Circuit Court for the Northern District of that state, to recover certain taxes, which it was alleged had been illegally assessed against the railway company, and which had been theretofore paid. The state law provided that any person who, having paid his taxes, was dissatisfied with the assessment, might, subject to certain conditions, bring an action against the state treasurer for the recovery of the amount of the taxes so claimed to have been illegally assessed, subject to the right of the treasurer, if suit was brought in some other court, to demand that the action be tried in the superior court of the County of Sacramento. Provision was made for payment of

any judgment obtained in such suit, etc. It was held in the case that the provision of the state law authorizing suit against the treasurer amounted only to consent on the part of the state that such suit might be brought in the state courts, and did not amount to consent to such suits in any United States court. The point was made in this case that it was in effect a suit against the state, and as to this the court said:

'Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against the officer in his official capacity; and the judgment would compel him to pay out of the public funds in the treasury of the state, a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S., 204, 221, and authorities there cited. In the present case, the action is not to recover specific moneys in the hands of the state treasurer, or to compel him to perform a plain ministerial duty; it is to enforce the liability of



the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act, to the injury of the plaintiffs in their persons or property; but one to compel the state, through its officers, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

'The case in some material aspects is like that of *Louisiana v. Jumel*, 107 U. S., 711. That was a proceeding by mandamus against officers of Louisiana, to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations, and directed its officers not to pay. The court say: 'It may be without doubt easily ascertained from the accounts how much of the money on hand is applicable to the payment of these debts; but the law nowhere requires the setting aside of this fund, any more than others, from the common stock. In the treasury all funds are mingled together and kept so until called for to meet specific demands. The remedy sought in order to be complete would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal, and interest were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set

in its place. When a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion to grant the relief asked for in either of these cases would be to exercise such a power.'

'We are clearly of opinion that within the meaning of the constitutional provisions, relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State, is against the State itself. *In re Ayres*, 123 U. S., 443; *Pennoyer v. McConnaughty*, 140 U. S., 1-10.'

In *Louisiana v. Jumel*, *supra*, it is said :

'The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax-collectors and paid over to him, that is to say, into the state treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the state. If there is any trust, the state is the trustee, and unless the state can be sued, the trustee cannot be enjoined. The officers owe duty to the state alone, and have no contract relations with the bond-

holders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the state, but not the state through them.

'In this connection there is much that is instructive in *Reg. v. Lords Commissioners of the Treasury*, Law Rep. 7 Q. B. 387. There money had been appropriated by Parliament for the payment of costs of a particular character, and an application was made for a mandamus to compel the Lords Commissioners of the Treasury to pay certain bills which had been properly taxed; but although the court was emphatic in its declaration that payment ought to be made, the writ was refused because the Lords Commissioners held "the money as the servants of the Crown, and no duty was imposed upon them as between them and the persons of whom the money was payable." Lord Chief Justice Cockburn, in his opinion, said (p. 394): "Though I quite agree that according to the appropriation act they (the Lords Commissioners) were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown; because in that character they have received the money, and in no other." And Blackburn, J. (p. 399): "It seems to me that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants." So, here, the obligation is all on the state, to be dis-

charged through its servants, and the money is held by the officers proceeded against in their character as servants of the state, and no other.'

In *Murray v. Wilson Distilling Company*, 92 C. C. A. 1, it is said:

'Undoubtedly the Eleventh Amendment was intended to prevent a federal court in suits prosecuted by citizens of another state or subjects of a foreign state from interfering with a state in the preservation of its autonomy in maintaining its own system of self-government so long as such system is in harmony with the Constitution of the United States. To this end, therefore, the funds of the state in its treasury, or held by its officers or agents, for use in the administration of the governmental affairs of the state, are not to be affected by the process of the federal court, nor can such court entertain jurisdiction of an action which has for its purpose an investigation of the right of the state to manage and control its internal affairs; or of an action which will obstruct the state authority or impair the state instrumentalities in the discharge of legitimate functions in the maintenance of the state's integrity. To be more concise: The exceptional inhibition is to the effect that the courts of the United States cannot entertain jurisdiction in action at the instance of a citizen, first, which seeks to recover against the state the property belonging to the state, or the purpose of which is and the result of which would be to disturb the legal and orderly administration of the state's internal and governmental affairs by its bonded officers and agents.'

"In this case, involving a state of facts somewhat analogous to the case at bar, the Circuit Court of Appeals, for the Fourth Circuit, held that the suit against the Commissioners to wind

up the State Liquor Dispensary of South Carolina was not in effect a suit against the state, but the Supreme Court reversed this decision, holding the suits to be against the state. *Murray v. Wilson Distilling Co.*, 213 U. S., 151.

"While on the demurrer I was of a different opinion, after careful consideration of all the authorities presented by counsel for both sides, I am forced to the conclusion that so far as the recovery of a money judgment sought against the Banking Board finally is concerned, it is in effect a suit against the state. The plaintiff seeks a decree adjudging him to have the right of a depositor, such as the bank guaranty fund legislation of the state is designed to protect, fixing the amount of his recovery as such, and compelling the State Banking Board to pay the same out of the bank guaranty fund, and, if necessary, to make special assessments against the several state banks. If, as I conclude, the Bank Guaranty Fund is a fund belonging to the state in the custody and control of which the members of the State Banking Board are merely the agents of the state in disbursing this fund to depositors, thereby representing the state in effectuating its policy and purpose, as evidenced by the bank guaranty legislation, it follows, under the foregoing authorities, that a suit by a depositor against the board to enforce the payment of his deposit in a failed bank out of the bank guaranty funds, is in effect a suit against the state."

In the course of the administration of the depositors' guaranty fund many conflicts of opinion and jurisdiction would necessarily occur if the courts should assume the authority to participate in the administration of this fund. Under the statutes quoted in the Brief for Appellants, control of this fund by the Banking Board is practically complete. It may be used not only to pay the

depositors of failed banks but frequently to aid banks while in a failing condition. All of the fund which may be available at a particular time might, in the judgment of the Banking Board, be better used to aid disabled banks than to be applied to the immediate payment of depositors of a particular bank which had already been taken into the custody of the Bank Commissioner. In this way the available funds might be withdrawn by the Banking Board in the exercise of its discretion from the payment of a failed bank, but the court might decide that the fund should be used to pay the deposits of a particular bank whose assets might be involved in litigation before the court.

In this case and in innumerable other cases which might be imagined there would be an unseemly conflict of jurisdiction between the judicial and the Executive Department of the Government. This is true if the State courts alone should assume jurisdiction to interfere in the administration of the depositors' guaranty fund. More intense and complicated conflicts would arise, of course, if the Federal courts should assume the jurisdiction to administer on any part of the depositors' guaranty fund.

Hence, we submit that the only safe rule to observe is that the administration of this fund, which under the decision of the Supreme Court of Oklahoma has been held to be one of the public funds of the State, should be left exclusively to the officers composing the Banking Department of the State.

Respectfully submitted,

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